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Casey J. Davis

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NOT SO SECURE: SHOULD SOCIAL SECURITY BENEFITS BE CONSIDERED IN THE GOOD FAITH ANALYSIS UNDER 11 U.S.C. § 1325(A)(3)?

*Casey J. Davis**

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I. INTRODUCTION

We have all heard the old adage “pigs get fat, but hogs get slaughtered,”¹ which serves as a reminder that greed can be both a vice and a weakness, especially in bankruptcy law. As a result of politics, society has created two characters within the bankruptcy realm: greedy, heartless creditors, who attack meek and helpless debtors; and the deadbeat debtors, who are causing creditors to lose millions every year. Politics aside, bankruptcy is a major issue within America. In 2012, 1,221,091 individuals and businesses filed for bankruptcy in the United States.² Of the 363,280 nonbusiness Chapter 13 filings, 19.65 percent

1. *In re Mains*, 451 B.R. 428, 436 (Bankr. W.D. Mich. 2011) (quoting *In re Williams*, 394 B.R. 550, 573 (Bankr. D. Colo. 2008)). This saying stands for the notion that individuals should be leery of becoming too greedy or else they will get into trouble.

2. TABLE F-2 – U.S. BANKRUPTCY COURTS – BUSINESS AND NONBUSINESS CASES

were filed in the Eleventh Circuit, 17.01 percent were filed in the Ninth Circuit, and 13.51 percent were filed in the Sixth Circuit.³ The Central District of California had the most bankruptcy filings at 105,515, which was 48,561 more claims than the second highest, the Northern District of Illinois, with 56,954 claims.⁴

With such an abundance of claims filed each year in America, bankruptcy courts have been faced with determining whether each claim is valid. This requires courts to determine if a debtor's plan is proposed in good faith.⁵ The good faith requirement under 11 U.S.C. § 1325(a), however, has caused a major division among courts. Courts are split on the issue of whether a bankruptcy court may consider an above-median-income debtor's⁶ decision not to commit available Social Security benefits to unsecured creditors in the good faith analysis under § 1325(a)(3).⁷ As a result, good faith has become one of the most-litigated issues;⁸ particularly under Chapter 13 of the Bankruptcy Code.⁹ I conclude in this Comment that courts should consider an above-median-income debtor's decision not to commit Social Security benefits to unsecured creditors as a factor in the good faith analysis.

With the sheer volume of bankruptcy filings each year, it is vital for

COMMENCED, BY CHAPTER OF THE BANKRUPTCY CODE, DURING THE 12-MONTH PERIOD ENDING DECEMBER 31, 2012 (2013), <http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2012/december/F02Dec12.pdf>. (Of the 1,221,091 bankruptcy filings in 2012, 843,545 individuals/businesses filed for Chapter 7 bankruptcy, 10,361 individuals/businesses filed for Chapter 11 bankruptcy, 512 individuals/businesses filed for Chapter 12 bankruptcy, and 366,532 individuals/businesses filed for Chapter 13 bankruptcy.). The number of filings is down 13.4 percent from 2011. TABLE F-2 – U.S. BANKRUPTCY COURTS – BUSINESS AND NONBUSINESS CASES COMMENCED, BY CHAPTER OF THE BANKRUPTCY CODE, DURING THE 12-MONTH PERIOD ENDING DECEMBER 31, 2011 (2012), <http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2011/Dec-11/F02Dec11.pdf>.

3. TABLE F-2 (2013), *supra* note 2. (The following is a breakdown of the 363,280 nonbusiness Chapter 13 filings that occurred in 2012: DC Circuit (113); First Circuit (12,369); Second Circuit (7,386); Third Circuit (16,758); Fourth Circuit (31,605); Fifth Circuit (42,759); Sixth Circuit (49,062); Seventh Circuit (35,619); Eighth Circuit (19,114); Ninth Circuit (61,795); Tenth Circuit (15,319); and Eleventh Circuit (71,381)).

4. *Id.*

5. Confirmation of Plan, 11 U.S.C. § 1325(a)(3) (2010).

6. "An above-median debtor is an individual whose income is above the median for his state. See 11 U.S.C. § 1325(b)(3). Whether a debtor's income falls above or below the median determines which expenses he can claim as 'amounts reasonably necessary to be expended . . . for the maintenance or support of the debtor or a dependent' under § 1325(b)'s disposable income calculation. See 11 U.S.C. §§ 707(b)(2), 1325(b)(2)(A)(i), 1325(b)(3)(A)." *Anderson v. Cranmer* (*In re Cranmer*), 697 F.3d 1314, 1318 n.2 (10th Cir. 2012).

7. *Baud v. Carroll*, 634 F.3d 327, 346 n.13 (6th Cir. 2011).

8. Elisabeth S. Ladd, In re Okoreeh-Baah, *The Status of Good Faith Under Chapter 13*, 20 U. TOL. L. REV. 699, 699 (1989) (citing 5 COLLIER ON BANKRUPTCY ¶1325.04 (15th ed. 1988)).

9. 11 U.S.C. §§ 1301-30 (2006).

courts to resolve this issue. Part II of this Comment provides background information about Chapter 13 bankruptcy. This section is important because it provides a foundation for the remainder of this Comment. Part III of this Comment explores the source of this split and how the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) has affected this issue. Within Part III, this Comment will discuss why Congress enacted BAPCPA, the largest overhaul of bankruptcy law since its origin, and why BAPCPA did not affect the good faith requirement under § 1325(a)(3) even though BAPCPA drastically altered bankruptcy law. In addition, this section also discusses how BAPCPA significantly altered Chapter 7 bankruptcy, which affects Chapter 13 bankruptcy when a debtor abuses the requirements of 11 U.S.C. § 707(b)(3)(B) and must either convert to a Chapter 13 bankruptcy filing or have his/her case dismissed.

Part IV provides a detailed examination of the good faith analysis under 11 U.S.C. § 1325(a). This examination of § 1325(a) outlines the varying definitions of good faith and provides a detailed look at the totality of circumstances test by discussing the varying factors courts have adopted. Part V addresses the split among courts on this issue. This section provides an in-depth look at cases that have ruled specifically on this issue and why the courts held the way they did. Part VI will provide an analysis on why courts should adopt the stance that a debtor’s decision not to commit available Social Security benefits to unsecured creditors should be included in the good faith analysis under § 1325(a). This analysis starts by addressing the arguments made by proponents who oppose including a debtor’s decision to exclude Social Security benefits as a factor courts may consider. This Comment analyzes why these views are misguided and concludes with why the prevailing view should be to include the debtor’s decision as a factor under the good faith analysis.

In advocating for this view, this Comment is not proposing a *per se* rule. Instead, this Comment is advocating that the inclusion of Social Security benefits only be a factor that courts may consider. To advocate for a *per se* rule in either direction destroys the very purpose of the good faith test. Part VII offers a brief summary and conclusion of the Comment.

II. CHAPTER 13 BACKGROUND INFORMATION

In *Grogan v. Garner*,¹⁰ the United States Supreme Court found that the “central purpose of the Bankruptcy Code is to provide a procedure to give certain debtors a fresh start and to maximize the payments to creditors.”¹¹ Chapter 13 bankruptcy, also known as a “wage earner’s plan,” enables individuals who have regular income to have a “fresh start” by developing a plan to repay all or a portion of their debts.¹² The House Report notes “[t]he purpose of Chapter 13 is to enable an individual . . . to develop and perform under a plan for the repayment of his debts,” recognizing that some cases may require full repayment, while others may require only a percentage of repayment of a creditor’s claims.”¹³ The Senate Report also states that Chapter 13 and its “generally liberalized provisions . . . were primarily ‘designed to serve as a flexible vehicle for the repayment of part or all of the allowed claims of the debtor.’”¹⁴

Chapter 13 offers individuals a variety of advantages over alternative filings, such as Chapter 7 liquidation.¹⁵ The most noted advantage is that Chapter 13 allows the debtor the opportunity to stop foreclosure proceedings and save his/her home from foreclosure.¹⁶ The debtor is still responsible for making the appropriate mortgage payments, but Chapter 13 prevents individuals from losing their homes.¹⁷ In addition, Chapter 13 is advantageous because individuals will have no direct contact with creditors.¹⁸ This is a result of the Chapter 13 bankruptcy structure, which “acts like a consolidation loan where the individual makes the plan payments to a [C]hapter 13 trustee who then distributes payments to creditors.”¹⁹

10. *Grogan v. Garner*, 498 U.S. 279, 286 (1991).

11. *In re Barnes*, 12-06613-8-RDD, 2013 WL 153848 (Bankr. E.D. N.C. Jan. 15, 2013) (citing *Grogan*, 498 U.S. 279, 286 (1991)).

12. Administrative Office of the U.S. Courts, *Chapter 13 - Individual Debt Adjustment*, <http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter13.aspx>.

13. Ladd, *supra* note 8, at 714 (citing H.R. REP. No. 595, 95th Cong., 2d Sess., at 1, 118, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963).

14. Ladd, *supra* note 8, at 714 (citing S. REP. No. 989, 95th Cong., 2d Sess., at 13, 141, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787).

15. Administrative Office of the U.S. Courts, *supra* note 12.

16. *Id.*

17. *Beaulieu v. Ragos (In re Ragos)*, 700 F.3d 220, 221 (5th Cir. 2012).

18. Administrative Office of the U.S. Courts, *supra* note 12.

19. *Id.*

III. SOURCE OF THE SPLIT: PRE- AND POST-BAPCPA AND THE SOCIAL SECURITY ACT

A. *BAPCPA Was Adopted in an Effort to Restore Integrity to the Bankruptcy System*

America's first bankruptcy law was passed in 1800.²⁰ Under this law, "discharge was available only with creditors' consent, and could be denied if the debtor was found to have engaged in certain conduct, including failure to disclose a fictitious claim, gambling losses, or successive bankruptcies."²¹ In the years following, bankruptcy law underwent various changes.²² None, however, altered bankruptcy law like the Bankruptcy Abuse Prevention and Consumer Act of 2005.²³

On April 20, 2005, President George W. Bush signed BAPCPA into effect, which marked the most drastic change to the Bankruptcy Code since it was first enacted in 1978.²⁴ When the Act went into effect on October 17, 2005, it elevated the standard of proof required to qualify for bankruptcy.²⁵ Those in favor of the Act believe that the Act's intent was "to increase fiscal responsibility of individuals and business entities."²⁶ In contrast, detractors of the Act believe that the Act has "an adverse financial effect on individuals who [seek] relief from debts caused by extenuating circumstances such as illness, divorce, or long-term unemployment."²⁷

Whether or not the BAPCPA will have an adverse financial effect on these individuals or not, "[w]hen Congress adopted the [BAPCPA], it represented a shift in public policy from making 'bankruptcy a more effective remedy for the unfortunate consumer debtor,' to 'restoring personal responsibility and integrity to the bankruptcy system.'"²⁸

20. Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 (1800) (repealed 1803).

21. Robert J. Bein, *Subjectivity, Good Faith and the Expanded Chapter 13 Discharge*, 70 MO. L.REV. 655, 660 (2005) (citing Bankruptcy Act of 1800, ch. 19, §§ 37 & 57 (repealed 1803)); see also Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 350-51 (1991).

22. See Bein, *supra* note 21, at 660-69 (discussing the changes of bankruptcy law, including Bankruptcy Act of 1841, Bankruptcy Act of 1867, Bankruptcy Act of 1898, Bankruptcy Code of 1978, and BAPCPA of 2005).

23. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).

24. 2005 Bankr. Reform Legis. with Analysis 2d §1.1.

25. Robert J. France, *The 2005 BAPCPA: A Reality Check*, 7 U.C. DAVIS BUS. L.J. 6, 6 (2007).

26. *Id.*

27. *Id.*

28. Henry E. Hildebrand, III, *Impact of the Bankruptcy Abuse Prevention and Consumer*

The Tenth Circuit reviewed the House Report issued just prior to the enactment of BAPCPA and found:

The heart of [BAPCPA's] consumer bankruptcy reforms consists of the implementation of an income/expense screening mechanism ('needs-based bankruptcy relief' or 'means-testing'), which is intended to ensure that debtors repay creditors the maximum they can afford. H.R. Rep. No. 109 31, pt. 1, at (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89 While the statement in the House Report is exceedingly general for our purposes and expresses the view only of the members of the Judiciary Committee, it is consistent with the forward-looking approach, which assists a Chapter 13 debtor to propose a confirmable plan and repay creditors the maximum she can afford-no more and no less.²⁹

This drastic overhaul of Chapter 13's requirements by enacting BAPCPA was more than an effort to restore integrity to the bankruptcy system.³⁰ It was also a way for Congress to encourage more debtors to seek bankruptcy relief under Chapter 13, rather than Chapter 7.³¹ Proponents of this view argue that Congress "plainly believes" that Chapter 13 cases are better than Chapter 7 for all creditors and debtors,³² and as a result, Congress enacted BAPCPA to "cause the majority of consumer debtors to proceed under Chapter 13, rather than Chapter 7."³³

Prevention Act of 2005 on Chapter 13 Trustees, 79 AM. BANKR.L.J. 373, 373, n.3 (2005) (internal quotations omitted) (citing H.R. REP. 95-595, at 5966 (1977); H.R. REP. 109-31, at p.2 (2005)).

29. *In re Lanning*, 545 F.3d 1269, 1280-81 (10th Cir. 2008).

30. Bein, *supra* note 21, at 668.

31. *Id.* (citing H.R. REP. No. 95-595, at 5 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 5966 ("In the consumer area, proposed Chapter 13 encourages more debtors to repay their debts over an extended period rather than to opt for straight bankruptcy liquidation and discharge.")).

32. Bein, *supra* note 21, at 667 ("Notwithstanding this Congressional bias, Chapter 7 filings are statistically more common than Chapter 13." *See* Non-Business Bankruptcy Filings by Chapter 1990-2005, at http://www.abiworld.org/Template.cfm?Section=Filings_by_Chapter&CONTENTID=10996&TEMPLATE=/ContentManagement/ContentDisplay.cfm).

33. Bein, *supra* note 21, at 668, n.90 ("See 2005 Act § 102. The Congressional preference for Chapter 13 filings, reflected in legislative efforts to make it more difficult for consumers to qualify for Chapter 7 relief and to force more debtors to proceed under Chapter 13 dates back to 1964. *See* H.R. 5771, 90th Cong. (1967) (requiring an affirmative showing that relief under Chapter 13 would not be adequate for a debtor to qualify for Chapter 7 relief); H.R. 1057, 90th Cong. (1967) (same); S. 613, 89th Cong. (1965) (same); H.R. 292, 89th Cong. (1965) (same); H.R. 12,784, 88th Cong. (1964) (same). The 1973 Bankruptcy Commission recommended against imposition of a mandatory Chapter 13. *See* Report of the Commission of the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, at 411-12 (1973), *reprinted in* COLLIER ON BANKRUPTCY, at App. Pt. 4-412 (Lawrence P. King ed., 15th ed. Rev. 2001) (App. 4(c)). Efforts to restrict Chapter 7 filings were renewed in 1978, and continued through the 1980s. *See* Act of Nov. 6, 1978, § 721, 92 Stat. at 2606; H.R. 4786, 97th Cong. § 2 (1981); S. 2000, 97th Cong. § 2(c) (1981); Omnibus Bankruptcy Improvements Act of 1983, S. 445, 98th Cong. (1983); H.R. 5174, 98th Cong. (1984). The 2005 Act is the product of

A reason for this is because under a Chapter 13 proceeding, the debtor must propose a plan under which his/her income will be used to repay some or all of the debts.³⁴ This idea was reiterated by the Supreme Court in *In re Lanning*,³⁵ where it “noted that the purpose of BAPCPA was to ensure that plans did not ‘deny creditors payments that the debtor could easily make.’”³⁶

B. BAPCPA Has Not Affected the Good Faith Requirement Under § 1325(a) as It Is Written

The adoption of BAPCPA did not have a true effect on the good faith requirement under § 1325(a);³⁷ rather, it primarily affected § 1325(b).³⁸ BAPCPA, however, did make substantial changes to Chapter

several years of legislative effort, dating directly from the Bankruptcy Reform Act of 2000. Gekas-Grassley Bankruptcy Reform Act of 2000, H.R. 2415, 106th Cong. (2000). Throughout the five year gestation of the 2005 Act, each iteration of proposed reform legislation has featured an enhanced emphasis on Chapter 13 as a centerpiece. Reform proposals in 2000, 2001, 2002, 2003, and 2004 all included means test provisions that would permit a debtor to obtain relief under Chapter 7 only upon an affirmative showing that the debtor lacks the means to fund a Chapter 13 plan. See Bankruptcy Abuse Prevention and Consumer Protection Act of 2003, H.R. 975, 109th Cong. § 102 (2003) (passage of which was debated during both 2003 and 2004); Bankruptcy Abuse Prevention and Consumer Protection Act of 2002, H.R. 333, 108th Cong. § 102 (2002); Bankruptcy Reform Act of 2001, H.R. 5745, 107th Cong. § 102 (2001); Bankruptcy Reform Act of 2000, S. 3186, 106th Cong. (2000); H.R. 2415, 106th Cong. (2000).”).

34. *In re Deluna*, BR 11-53444-C, 2012 WL 4679170 (Bankr. W.D. Tex. Oct. 2, 2012) (“The policy behind the enactment of Chapter 13 of the Bankruptcy Code was ‘to encourage more debtors to repay their debts over an extended period rather than to opt for straight bankruptcy liquidation and discharge’ and ‘to permit almost any individual with regular income to propose and have accepted a reasonable plan for debt repayment based on that individual’s exact circumstances.’” citing H.R. REP. No. 595, 95th Cong. 1st Sess. 5 (1977); S. REP. No. 989, 95th Cong. 2d Sess. 13 (1978); *In re Hodbay*, 4 B.R. 417, 419 (Bankr. N.D. Ohio 1980)).

35. *Hamilton v. Lanning* (*In re Lanning*), 130 S. Ct. 2464 (2010).

36. *In re Flores*, 692 F.3d 1021, 1035 (listing cases that adopted the Supreme Courts stated purpose of the BAPCPA) (“*In re Lanning*, 130 S. Ct., at 2476; see also *Ransom v. FIA Card Servs.*, N.A., 131 S. Ct. 716, 729, 178 L.Ed.2d 603 (2011) (describing ‘BAPCPA’s core purpose [as] ensuring that debtors devote their full disposable income to repaying creditors’); *Baud v. Carroll*, 634 F.3d 327, 356 (6th Cir. 2011) cert. denied, 132 S. Ct. 997, 181 L. Ed. 2d 732 (2012) (*Lanning* requires courts to ‘apply the interpretation that has the best chance of fulfilling BAPCPA’s purpose of maximizing creditor recoveries’); H.R. Rep. No. 109 31(I), at 2 (2005), reprinted in 2005 U.S.C.A.N. 88, 89 (describing ‘[t]he heart of the bill’s consumer bankruptcy reforms’ as designed to ‘ensure that debtors repay creditors the maximum they can afford.’)”).

37. *In re Austin*, 372 B.R. 668, 672 (Bankr. D. Vermont 2007).

38. *Id.* at 672-73 (The statutory interpretation issue focuses on the meaning of “projected disposable income” in § 1325(b)(1)(B). That statute provides:

(b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan —

(A) the value of the property to be distributed under the plan on account of such claim is

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13 bankruptcy law.³⁹ “In addition to adding the good faith filing requirement of Code § 1325(a)(7) as a new confirmation requirement, the amendments revamped the projected disposable income test for confirmation in Code §1325(b).”⁴⁰

Instead of altering § 1325(a)(3)’s good faith requirement when BAPCPA was enacted in 2005, Congress instead affixed to § 1325(b) a more “detailed and objective disposable income test.”⁴¹ In doing so, there was no attempt by Congress to limit or overrule existing case law concerning the good faith requirement.⁴² “[W]hen Congress adopted BAPCPA, it is presumed to have had knowledge of the existing requirements for confirmation, including the interpretations given by the bankruptcy courts to the good faith requirement.”⁴³ Therefore, in choosing not to amend § 1325(a)(3)’s good faith requirement, it is clear the good faith requirement is still required even after BAPCPA’s enactment.⁴⁴ Furthermore, Congress actually reinforced this point in

not less than the amount of such claim; or

(B) the plan provides that *all of the debtor’s projected disposable income* to be received in the applicable commitment period beginning on the date that the first payment is due under the plan *will be applied to make payments to unsecured creditors under the plan.*

(2) For purposes of this subsection, ‘disposable income’ means *current monthly income received by the debtor* (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) *less amounts reasonably necessary to be expended —*

(A) (i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and

(ii) for charitable contributions (that meet the definition of ‘charitable contributions’ under § 548(d)(3) to a qualified religious or charitable entity or organization (as defined in § 548(d)(4)) in an amount not to exceed 15% of gross income of the debtor for the year in which the contributions are made; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

(3) Amounts reasonably necessary to be expended under paragraph (2) shall be determined in accordance with subparagraphs (A) and (B) of § 707(b)(2), if the debtor has current monthly income, when multiplied by 12, greater than—[the median income of a similarly sized family in the applicable State] §1325(b)(1)-(3)).

39. Chapter 13 Practice & Procedure § 9B:31 (2012).

40. *Id.*

41. *In re Sandberg*, 433 B.R. 837, 847 (Bankr. D. Kan. 2010).

42. *Id.* (“The only tweaking of the good faith requirement by BAPCPA was the addition of §1325(a)(7) – an express confirmation requirement that debtor filed the petition in good faith. *See* *Hamilton v. Lanning*, 130 S. Ct. 2464, 2475-76, 177 L.Ed.2d 23 (2010) (Courts will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure; BAPCPA did not amend the term “projected disposable income.”).”).

43. *Id.* at 848 (citing *generally* *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988)).

44. *Id.*

choosing to leave the open-ended and unqualified subjective determination of good faith under § 1325(a) undisturbed after already excluding Social Security benefits from the objective disposable income analysis of § 1325(b).⁴⁵

C. BAPCPA Affected the Interplay Between Chapter 7 and Chapter 13 Bankruptcy Cases

Unlike Congress's failure to amend the good faith requirement under § 1325(a), the adoption of BAPCPA drastically altered the standards for dismissal under Chapter 7.⁴⁶ Prior to BAPCPA's enactment, there was a presumption in favor of granting discharge in a Chapter 7 filing.⁴⁷ In connection with this presumption favoring discharge, there was a requirement under § 707(b) that an abuse of the bankruptcy system be "substantial."⁴⁸ Both of these requirements were eliminated, however, when BAPCPA was enacted in 2005.⁴⁹ In doing so, it showed Congress's intent that involuntary dismissal or conversion be made simpler for debtors.⁵⁰

This is pivotal because under Chapter 7 bankruptcy, if a debtor's "current monthly income":

- (1) is more than the state median, the Bankruptcy Code requires application of a 'means test' to determine whether the Chapter 7 filing is presumptively abusive. Abuse is presumed if the debtor's aggregate current monthly income over 5 years, net of certain statutorily allowed expenses, is more than (i) \$11,725, or (ii) 25% of the debtor's nonpriority unsecured debt, as long as that amount is at least \$7,025.
- (2) The debtor may rebut a presumption of abuse only by a showing of special circumstances that justify additional expenses or adjustments of current monthly income. Unless the debtor overcomes the presumption of abuse, *the case will generally be converted to [C]hapter 13 (with the debtor's consent) or will be dismissed.*⁵¹ (emphasis added).

45. *Mains v. Foley*, 1:11-CV-456, 2012 WL 612006, *4 (W.D. Mich. Feb. 24, 2012).

46. David P. Eron, *Social Security Benefits Must Be Included in a Debtor's Ability to Repay under BAPCPA*, ABI JOURNAL 34, 34 (Sept. 2011).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. Administrative Office of the U.S. Courts, *Ch. 7-Liquidation Under the Bankruptcy Code*, <http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter7.aspx> (citing 11 U.S.C. § 707(b)(1)).

The language of 11 U.S.C. § 707(b)(1) highlights the connection between Chapter 7 and Chapter 13 bankruptcy.⁵² This connection is particularly important in cases where an individual has failed to commit available Social Security benefits to unsecured creditors because, as § 707(b)(1) states, when a debtor fails to overcome a presumption of abuse, the debtor's case is converted to a Chapter 13 case or is dismissed.⁵³

In two recent decisions, *In re Booker*⁵⁴ and *In re Calhoun*,⁵⁵ bankruptcy courts have considered this issue of whether a debtor's decision to exclude available Social Security benefits constitutes an abuse under § 707(b)(3)(B) and therefore, must be converted to Chapter 13 or dismissed.⁵⁶ In both cases, the courts held that a debtor's decision to exclude Social Security benefits should be considered in determining whether a debtor has abused § 707(b)(3)(B).⁵⁷ Both courts held that the debtors had the ability to repay a significant portion of their debt to unsecured creditors.⁵⁸

Chapter 13 then becomes an issue in situations like *Booker* and *Calhoun* because the debtors must either convert their filings to Chapter 13 or have their case dismissed.⁵⁹ Under Chapter 13, the issue is more complicated by the

juxtaposition of (1) the exclusion of Social Security benefits from the calculation of median and disposable income for all Chapter 13 debtors, and (2) the good-faith requirement of § 1325(a) and the *Lanning*⁶⁰ decision holding that "projected disposable income" means something different than "disposable income."⁶¹

It is because of this juxtaposition that Chapter 13's good faith analysis is "the most litigated issue under Chapter 13."⁶²

52. *Id.* ("Unless the debtor overcomes the presumption of abuse, the case will generally be converted to chapter 13 . . .").

53. *Id.* (citing 11 U.S.C. § 707(b)(1)).

54. *In re Booker*, 399 B.R. 662, 668 (Bankr. W.D. Mo. 2009).

55. *In re Calhoun*, 396 B.R. 270, 276 (Bankr. D. S.C. 2008).

56. Eron, *supra* note 46, at 34.

57. *Id.*

58. *Id.*

59. Administrative Office of the U.S. Courts, *Ch. 7-Liquidation Under the Bankruptcy Code*, <http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter7.aspx>. (citing 11 U.S.C. § 707(b)(1) ("Unless the debtor overcomes the presumption of abuse, the case will generally be converted to chapter 13.")).

60. *Hamilton v. Lanning*, 560 U.S. 505 (2010).

61. Eron, *supra* note 46, at 34.

62. Ladd, *supra* note 8, at 699 (citing *See generally* 5 COLLIER ON BANKRUPTCY ¶1325.04 (15th ed. 1988)).

IV. 11 U.S.C. § 1325(A)(3)

Although 11 U.S.C. § 1325(a)(3) requires that a plan be proposed in “good faith,” good faith has never been defined in the Bankruptcy Code.⁶³ This section looks at how other sources, both legal and non-legal, have defined “good faith.” This includes such sources as Black’s Law Dictionary and Webster’s Dictionary. In addition, this section discusses the “totality of circumstances” test that courts have developed to help guide bankruptcy courts in making a good faith determination. In discussing the “totality of circumstances” test, this section will review a variety of lists that courts have compiled of non-exclusive factors to consider under the totality of circumstances test.

A. *Good Faith Requirement*

The good faith requirement is enumerated in 11 U.S.C. § 1325(a)(3):

“(a) Except as provided in subsection (b), the court shall confirm a plan if –

...

(3) the plan has been proposed in good-faith and not by means forbidden by law[.]”

B. *Good Faith Analysis Under 11 U.S.C. § 1325(a)(3)*

A bankruptcy court shall confirm an otherwise appropriate Chapter 13 plan if “the plan has been proposed in good faith and not by any means forbidden by law.”⁶⁴ The “good faith” requirement is a policing mechanism used by bankruptcy courts to assure that individuals who have invoked their right to Chapter 13 bankruptcy do so only to accomplish the “aims and objectives of bankruptcy philosophy and policy and for no other purpose.”⁶⁵ Therefore, in assessing whether a debtor’s filing for Chapter 13 has been done in good faith, the bankruptcy court must consider the debtor’s respect for the underlying

63. *In re Thompson*, 439 B.R. 140, 143 (8th Cir. 2010) (citing *In re LeMaire*, 898 F.2d 1346, 1348 (8th Cir. 1990)).

64. 11 U.S.C. § 1325(a)(3) (“(a) Except as provided in subsection (b), the court shall confirm a plan if – . . . (3) the plan has been proposed in good faith and not only by any means forbidden by law”).

65. Mark E. Roszkowski, *Good Faith and Chapter 13 Plans for Debts Nondischargeable Under Chapter 7 of the Bankruptcy Code: A Proposal to Assure Rehabilitation, Not Liquidation*, 46 BUS. LAW. 67, 83 n.72 (1990) (citing *In re Chase*, 43 B.R. 739 (D.C. Md. 1984).

goals and policies of the Bankruptcy Code.⁶⁶ The good faith inquiry is used to “determine under the totality of the circumstances of a case whether there has been an abuse of the provisions, purpose, or spirit of Chapter 13.”⁶⁷ As a result, this inquiry may be based upon a question of fundamental fairness.⁶⁸ The ultimate burden is on the debtor to prove that the plan was proposed in good faith.⁶⁹ A bankruptcy court, absent an objection by a creditor or trustee, has an independent duty to ensure that all prerequisites for plan confirmation, primarily good faith, have been satisfied.⁷⁰

The term “good faith” is not defined in the Bankruptcy Code, nor has it been defined in its legislative history.⁷¹ As a result, it has been at the center of extensive litigation, prompting courts to develop their own criteria for determining what constitutes “good faith.”⁷² Additionally, other sources have attempted to define “good faith.” For example, Webster’s Dictionary defines “good faith” as “a state of mind indicating honesty and lawfulness of purpose.”⁷³ Similarly, Black’s Law Dictionary offers this definition:

Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage, and an individual’s personal good faith is concept [sic] of his own mind and inner spirit and, therefore, may not conclusively be determined by his protestations alone⁷⁴

The Uniform Commercial Code defines “good faith” as “honesty in fact

66. *In re Elisade*, 172 B.R. 996, 1000 (Bankr. M.D. Fla. 1994).

67. *In re Sandberg*, 433 B.R. 837, 845 (Bankr. D. Kan. 2010); *See also In re Hylton*, 374 B.R. 579, 586 (Bankr. W.D. Va. 2007); *In re Humphrey*, 165 B.R. 508, 510-11 (Bankr. M.D. Fla. 1994).

68. *In re Sandberg*, 433 B.R. at 845 (citing *Matter of Love*, 957 F.2d 1350, 1357 (7th Cir. 1992)).

69. *In re Patrick*, 12-03042-NPO, 2013 WL 168222, *2 (Bankr. S.D. Miss. Jan. 16, 2013) (citing *Suggs v. Stanley (In re Stanley)*, 224 Fed. Appx. 343, 346 (5th Cir. 2007)); *In re Barnes*, 12-06613-8-RDD, 2013 WL 153848, *9 (Bankr. E.D. N.C. Jan. 15, 2013).

70. *In re Barnes*, 12-06613-8-RDD, 2013 WL 153848, *9 (Bankr. E.D. N.C. Jan. 15, 2013) (citing *United States Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 277 (2010)).

71. *In re Thompson*, 439 B.R. 140, 143 (8th Cir. 2010) (citing *In re LeMaire*, 898 F.2d 1346, 1348 (8th Cir. 1990)).

72. *In re Barnes*, 12-06613-8-RDD, 2013 WL 153848, *9 (Bankr. E.D. N.C. Jan. 15, 2013).

73. *In re Keach*, 243 B.R. 851, 856 (B.A.P. 1st Cir. 2000) (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 978 (Merriam Webster Inc. 1986)).

74. *In re Keach*, 243 B.R. 851, 856 (B.A.P. 1st Cir. 2000) (citing BLACK’S LAW DICTIONARY 623 (5th ed. 1979)).

in the conduct or transaction concerned.”⁷⁵

In considering the above definitions, some courts have attempted to define the “good faith” requirement of a Chapter 13 plan as “meaningful or substantial” payments.⁷⁶ Determining the “meaningfulness” of a proposed payment plan requires courts to look at each plan on a “case-by-case basis, weighing both interests of creditors and debtors in the light of the rehabilitative goals of [Chapter 13 bankruptcy].”⁷⁷ The good faith requirement, however, does not require any particular amount of minimum repayment⁷⁸ as a prerequisite to meeting the good faith requirement; rather, good faith means honesty of intention.⁷⁹

The good faith requirement “demands a separate, independent determination . . . [T]he proper inquiry should [analyze] whether the plan constitutes an abuse of the provisions, purpose or spirit of Chapter 13.”⁸⁰ In doing so, “[t]he bankruptcy court must utilize its fact-finding expertise and judge each case on its own facts after considering all the

75. U.C.C. § 1-201(19); *In re Keach*, 243 B.R. at 856 n.13 (The Uniform Commercial Code, in the context of a sales transaction involving a merchant, “contains a definition of good faith in a sales transaction involving a merchant, which contains both subjective and objective elements: ‘honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.’” U.C.C. § 2-103(b)).

76. 73 A.L.R. FED. 10 (*See Matter of Jolly*, 13 B.R. 123 (Bankr. E.D. Wis. 1981); *In re Alexander*, 344 B.R. 742 (Bankr. E.D. N.C. 2006)).

77. *Barnes v. Whelan*, 689 F.2d 193, 196 (D.C. Cir. 1982) (quoting *In re Montano*, 4 B.R. 535 (Bankr. D.D.C. 1980), *aff’d and rem’d sub nom. In re Barnes*, 13 B.R. 997 (D.D.C. 1981)).

78. “A majority of [courts, however, have concluded] that the failure to provide for substantial repayment of creditors is a factor to be taken into account in considering good faith, but does not [necessarily] constitute bad faith *per se*.” Bein, *supra* note 21, at 673. (*See Downey Sav. & Loan Ass’n v. Metz (In re Metz)*, 820 F.2d 1495, 1498-99 (9th Cir. 1987); *In re Hines*, 723 F.2d 333, 335 (3d Cir. 1983); *Flygare v. Boulden*, 709 F.2d 1344, 1347 (10th Cir. 1983); *Kitchens v. Ga. R.R. Bank & Trust Co. (In re Kitchens)*, 702 F.2d 885, 887-89 (11th Cir. 1983); *United States v. Estus (In re Estus)*, 695 F.2d 311, 316 (8th Cir. 1982); *Deans v. O’Donnell (In re Deans)*, 692 F.2d 968, 969-72 (4th Cir. 1982); *Barnes v. Whelan*, 689 F.2d 193, 198-200 (D.C. Cir. 1982); *Ravenot v. Rimgale (In re Rimgale)*, 669 F.2d 426, 431-32 (7th Cir. 1982); *In re Quiles*, 262 B.R. 191, 195 (Bankr. D. R.I. 2001); *In re Fields*, 190 B.R. 16, 18 (Bankr. D. N.H. 1995); *In re Farmer*, 186 B.R. 781, 783 (Bankr. D. R.I. 1995); *In re Anderson*, 173 B.R. 226, 231 (Bankr. D. Colo. 1993); *In re Murrell*, 160 B.R. 128, 131 (Bankr. W.D. Mo. 1993); *see also Public Fin. Corp. v. Freeman*, 712 F.2d 219 (5th Cir. 1983). *Cf. Tenney v. Terry (In re Terry)*, 630 F.2d 634, 636 (8th Cir. 1980) (Chapter 13 plan which proposes no distribution to any creditors is *per se* bad faith). A minority of cases find a zero percent plan to be *per se* indicative of bad faith. *See, e.g., In re Lattimore*, 69 B.R. 622, 625-26 (Bankr. E.D. Tenn. 1987); *see also In re Seman*, 4 B.R. 568 (Bankr. S.D. N.Y. 1980)).

79. *Barnes v. Whelan*, 689 F.2d 193, 200 (D.C. Cir. 1982). *See also Deans v. O’Donnell*, 692 F.2d 968, 971-72 (4th Cir. 1982) (holding that there was no minimum repayment requirement to meet the good faith test, however, “[f]ailure to provide substantial repayment is certainly evidence that a debtor is attempting to manipulate the statute rather than attempting honestly to repay his debts.”).

80. *In re Estus*, 695 F.2d 311, 316 (8th Cir. 1982).

circumstances of the case.”⁸¹ Since good faith is an “amorphous notion, largely defined by factual inquiry,” courts have developed various factors that each court must carefully weigh.⁸² With such an infinite variety of factors facing any particular debtor, the courts must carefully weigh these factors keeping in mind that the plan must satisfy the purpose of Chapter 13 – “a sincerely-intended repayment of pre-petition debt consistent with the debtor’s available resources.”⁸³

The good faith requirement is deeply entrenched in American Bankruptcy policy.⁸⁴ “Every bankruptcy statute since 1898, has incorporated literally, or by judicial interpretation, a standard of good faith for the commencement, prosecution, and confirmation of bankruptcy proceedings.”⁸⁵ This is because the good faith requirement is entrenched in equitable principles.⁸⁶ The Bankruptcy Court, as a court of equity, “must balance the interest of the debtor[’s] fresh start with the interest of creditors . . . receiving fair treatment.”⁸⁷

In balancing these interests, the bankruptcy court must look at various factors such as “whether the debtor has stated his debts and expenses accurately; whether he has made any fraudulent misrepresentation to mislead the bankruptcy court; or whether he has unfairly manipulated the Bankruptcy Code.”⁸⁸ With different courts adopting various factor tests, the question remains as to what factors the court should consider when determining the debtor’s intent.⁸⁹ Courts reached a consensus after the enactment of the Bankruptcy Code in 1978 that the good faith test of § 1325(a)(3) requires a bankruptcy court to

81. *Id.*

82. *In re Okoreeh-Baah*, 836 F.2d 1030, 1033 (6th Cir. 1988).

83. *Id.*

84. *Bein*, *supra* note 21, at 670.

85. *Little Creek Dev. Co. v. Commonwealth Mortg. Corp. (In re Little Creek Dev. Co.)*, 779 F.2d 1068, 1071 (5th Cir. 1986).

86. *Bein*, *supra* note 21, at 670 (“See *Am. United Mut. Ins. Co. v. City of Avon Park*, 311 U.S. 138, 145 (1940) (questions of good faith in bankruptcy considered based upon principles of ‘[e]quity and good conscience.’).”).

87. *Id.* (“*In re Little Creek Dev. Co.*, 779 F.2d at 1072; *see also In re Casrud*, 161 B.R. 246, 252 (Bankr. D. S.D. 1993) (‘A good faith stance based on public policy should take into account the relationship between the debtor and objecting creditor – personal versus legal; individual versus institution – and then consider the impact of the conduct, not only at the time of infliction, but in the future as well.’).”).

88. *In re LeMaire*, 883 F.2d 1373, 1379 (8th Cir. 1989) (“*See In re Estus*, 695 F.2d 311, 317 (8th Cir. 1982); *In re Johnson*, 708 F.2d 865, 868 (2d Cir. 1983); *Barnes v. Whelan*, 689 F.2d 193, 200 (D.C. Cir. 1982); *In re Rimgale*, 669 F.2d 426, 432 (7th Cir. 1982); *see also* 5 COLLIER ON BANKRUPTCY ¶1325.04 [2], [3]”).

89. Virginia M. Hunt, *The Bankruptcy Good Faith Issue*, 47 CONSUMER FIN. L.Q. REP. 402, 408 (1993).

determine “whether a plan contradicts the purposes and spirit of the Bankruptcy Code.”⁹⁰ As a result, the appellate courts developed the “totality of circumstances” test to help guide the bankruptcy courts in making a good faith determination.⁹¹ In doing so, courts have compiled lists of non-exclusive factors to consider under the totality of the

90. See Chapter 13 Practice & Procedures § 9B:31.

91. See 73 A.L.R. FED. 10 (Originally published in 1985) (“In the following cases the courts held or stated that good faith under § 1325(a)(3) requires an inquiry into the facts and circumstances surrounding a debtor’s proposed plan, and not merely a determination based on the percentage of repayment to unsecured creditors:” **First Circuit:** *In re Ponanski* (1981, BC DC RI) 11 BR 661, 4 CBC2d 895, CCH Bankr L Rptr ¶68215; *In re Levine* (1981, BC DC Mass) 10 BR 168, 4 CBC2d 359, CCH Bankr L Rptr ¶67945; See also Chapter 13 Practice & Procedures § 9B:31, n. 5 (**Second Circuit:** *In re Johnson*, 708 F.2d 865, 11 Bankr. Ct. Dec. (CRR) 416, 8 Collier Bankr. Cas. 2d (MB) 756, Bankr. L. Rep. (CCH) P 69235 (2d Cir. 1983). **Third Circuit:** *In re Lilley*, 91 F.3d 491, 496, 36 Collier Bankr. Cas. 2d (MB) 609, Bankr. L. Rep. (CCH) P 77147, 96-2 U.S. Tax Cas. (CCH) P 50456, 78 A.F.T.R.2d 96-5884 (3d Cir. 1996); *In re Hines*, 723 F.2d 333, 11 Bankr. Ct. Dec. (CRR) 682, 9 Collier Bankr. Cas. 2d (MB) 1099, Bankr. L. Rep. (CCH) P 69512 (3d Cir. 1983). **Fourth Circuit:** *Neufeld v. Freeman*, 794 F.2d 149, Bankr. L. Rep. (CCH) P 71210 (4th Cir. 1986); *Deans v. O’Donnell*, 692 F.2d 968, 9 Bankr. Ct. Dec. (CRR) 994, 7 Collier Bankr. Cas. 2d (MB) 288, Bankr. L. Rep. (CCH) P 68851 (4th Cir. 1982). **Fifth Circuit:** *Matter of Chaffin*, 816 F.2d 1070, 16 Collier Bankr. Cas. 2d (MB) 1263, Bankr. L. Rep. (CCH) P 71813 (5th Cir. 1987); *Public Finance Corp. v. Freeman*, 712 F.2d 219, 10 Bankr. Ct. Dec. (CRR) 1344, 9 Collier Bankr. Cas. 2d (MB) 156, Bankr. L. Rep. (CCH) P 69393 (5th Cir. 1983). **Sixth Circuit:** *In re Okoreeh-Baah*, 836 F.2d 1030, 17 Bankr. Ct. Dec. (CRR) 193, 17 Collier Bankr. Cas. 2d (MB) 1466, Bankr. L. Rep. (CCH) P 72165 (6th Cir. 1988); *Memphis Bank & Trust Co. v. Whitman*, 692 F.2d 427, 9 Bankr. Ct. Dec. (CRR) 1140, 7 Collier Bankr. Cas. 2d (MB) 727, Bankr. L. Rep. (CCH) P 68901, Bankr. L. Rep. (CCH) P 68946 (6th Cir. 1982). See also *In re Barrett*, 964 F.2d 588, 27 Collier Bankr. Cas. 2d (MB) 101, Bankr. L. Rep. (CCH) P 74617 (6th Cir. 1992); *In re Caldwell*, 895 F.2d 1123, 20 Bankr. Ct. Dec. (CRR) 230, 22 Collier Bankr. Cas. 2d (MB) 379, Bankr. L. Rep. (CCH) P 73233 (6th Cir. 1990); *In re Caldwell*, 851 F.2d 852, 19 Collier Bankr. Cas. 2d (MB) 328, Bankr. L. Rep. (CCH) P 72358 (6th Cir. 1988); *In re Doersam*, 849 F.2d 237, 17 Bankr. Ct. Dec. (CRR) 1367, 47 Ed. Law Rep. 410, Bankr. L. Rep. (CCH) P 72322 (6th Cir. 1988). **Seventh Circuit:** *In re Rimigale*, 669 F.2d 426, 8 Bankr. Ct. Dec. (CRR) 874, 5 Collier Bankr. Cas. 2d (MB) 1281, Bankr. L. Rep. (CCH) P 68523 (7th Cir. 1982). See also *Matter of Smith*, 848 F.2d 813, 17 Bankr. Ct. Dec. (CRR) 1358, 18 Collier Bankr. Cas. 2d (MB) 1375, Bankr. L. Rep. (CCH) P 72325 (7th Cir. 1988). **Eighth Circuit:** *In re Estus*, 695 F.2d 311, 9 Bankr. Ct. Dec. (CRR) 1348, 7 Collier Bankr. Cas. 2d (MB) 948, Bankr. L. Rep. (CCH) P 68933 (8th Cir. 1982). See also *In re LeMaire*, 883 F.2d 1373, 19 Bankr. Ct. Dec. (CRR) 1016, 21 Collier Bankr. Cas. 2d (MB) 678, Bankr. L. Rep. (CCH) P 73005 (8th Cir. 1989). **Ninth Circuit:** *In re Goeb*, 675 F.2d 1386, 9 Bankr. Ct. Dec. (CRR) 175, 6 Collier Bankr. Cas. 2d (MB) 1208, Bankr. L. Rep. (CCH) P 68702, 73 A.L.R. Fed. 1 (9th Cir. 1982). **Tenth Circuit:** *Flygare v. Boulden*, 709 F.2d 1344, 10 Bankr. Ct. Dec. (CRR) 1044, 8 Collier Bankr. Cas. 2d (MB) 1027, Bankr. L. Rep. (CCH) P 69298 (10th Cir. 1983). See also *In re Young*, 237 F.3d 1168, 45 Collier Bankr. Cas. 2d (MB) 874, 17 I.E.R. Cas. (BNA) 284, Bankr. L. Rep. (CCH) P 78363 (10th Cir. 2001); *In re Rasmussen*, 888 F.2d 703, 19 Bankr. Ct. Dec. (CRR) 1597, 21 Collier Bankr. Cas. 2d (MB) 1060, Bankr. L. Rep. (CCH) P 73113 (10th Cir. 1989). **Eleventh Circuit:** *In re Kitchens*, 702 F.2d 885, 10 Bankr. Ct. Dec. (CRR) 812, 8 Collier Bankr. Cas. 2d (MB) 1022, Bankr. L. Rep. (CCH) P 69150 (11th Cir. 1983). **D.C. Circuit:** *Barnes v. Whelan*, 689 F.2d 193, 9 Bankr. Ct. Dec. (CRR) 626, 8 Collier Bankr. Cas. 2d (MB) 855, Bankr. L. Rep. (CCH) P 68799 (D.C. Cir. 1982)).

circumstances test, with similarly, but varying language.⁹² Application of these factors under the totality of the circumstances test requires a careful weighing of each factor on a case-by-case basis.⁹³ No one factor is conclusive, and the weight courts give to each factor depends upon the varying circumstances in each case.⁹⁴

*In re Montano*⁹⁵ proposed that courts look at factors such as “amount and type of indebtedness, debtor’s present and potential earnings, debtor’s present style of living and living expenses, and availability of property which might be utilized for liquidation of debts.”⁹⁶ Similarly, *In re Meltzer*⁹⁷ proposed that courts look at “the dollar amount of the outstanding debts and proposed percentage of repayment, the nature of the debts sought to be discharged[,] and to what extent the debtor is invoking the advantages of the broader Chapter 13 discharge.”⁹⁸ This approach was quickly criticized because Congress provided no basis for courts to determine whether the debtor should be penalized or not for “merely using the available broad discharge provisions of Chapter 13.”⁹⁹

The court in *In re Easley*¹⁰⁰ held that a plan was proposed in good faith after it considered the facts that the debtor “had no history of bankruptcy filings, . . . the debtor’s schedules were reasonably accurate, the plan proposed payment of all disposable income for thirty-six months, there were no unusual administrative problems[,] and where the

92. Chapter 13 Practice & Procedures §9B:31, n.6 (“See, e.g., *In re Alt*, 305 F.3d 413, 40 Bankr. Ct. Dec. (CRR) 75, 2002-2 U.S. Tax Cas. (CCH) P 50730, 90 A.F.T.R. 2d 2002-6540, 2002 FED App. 0343P (6th Cir. 2002) (twelve factors); *In re Armstrong*, 303 B.R. 213 (B.A.P. 10th Cir. 2004) (eleven factors); *In re McGovern*, 297 B.R. 650 (S.D. Fla. 2003) (fourteen factors); *In re Plagakis*, 51 Collier Bankr. Cas. 2d (MB) 1101, 2004 WL 203090 (E.D. N.Y. 2004) (sixteen factors, citing approaches from different cases); *In re Whitlock*, 308 B.R. 917 (Bankr. M.D. Ga. 2004) (eleven factors); *In re Lundahl*, 307 B.R. 233 (Bankr. D. Utah 2003) (eleven factors); *In re Jones*, 301 B.R. 840 (Bankr. E.D. Mich. 2003) (eleven factors); *In re Gonzales*, 297 B.R. 143, 50 Collier Bankr. Cas. 2d (MB) 1659 (Bankr. D. N.M. 2003) (eleven factors); *In re Ochs*, 283 B.R. 135 (Bankr. E.D. N.Y. 2002) (eighteen factors)”).

93. Chapter 13 Practice & Procedures § 9B: 31.

94. *Id.*

95. *In re Montano*, 4 B.R. 535 (Bankr. D.D.C. 1980), *aff’d and rem’d sub nom. In re Barnes*, 13 B.R. 997 (D.D.C. 1981).

96. *Id.* at 539.

97. Hunt, *supra* note 89, at 408 (citing *In re Meltzer*, 11 B.R. 624 (Bankr. E.D. N.Y. 1981) (holding debtor had a lack of good faith “since less than ten percent of the debt to unsecured creditors would be paid after deducting attorney fees and the trustee’s commissions from total payments under the plan”). See generally Roszkowski, *supra* note 65.

98. Hunt, *supra* note 89, at 408.

99. *Id.*

100. *In re Easley*, 72 B.R. 948 (Bankr. M.D. Tenn. 1987).

attorney's fees . . . were reasonable."¹⁰¹

In the *Matter of Kull*,¹⁰² the court held that "good faith" required a subjective analysis of the "totality of the debtor's circumstances," and proceeded to list a variety of factors "which the bankruptcy court must consider, but not be limited to" when deciding whether to confirm a debtor's bankruptcy plan.¹⁰³ The *Kull* court enumerated twelve factors as relevant to a good faith analysis.¹⁰⁴

After having considered the above courts' approaches to the good faith analysis, the Fourth, Eighth, Tenth, and Eleventh Circuits took a similar approach to the court in *Kull* and have all adopted the same non-exclusive factor analysis.¹⁰⁵ These factors were first outlined in *In re Deans*¹⁰⁶ and *In re Estus*¹⁰⁷ and later adopted by the courts in *Flygare v. Boulden*¹⁰⁸ and *In re Kitchens*.¹⁰⁹ Relying upon the court in *In re Kull*, these courts enumerated eleven factors, similar to the twelve factors enumerated in *In re Kull*.¹¹⁰

101. Hunt, *supra* note 89, at 408 (citing *In re Easley*, 72 B.R. 948 (Bankr. M.D. Tenn. 1987)).

102. *Matter of Kull*, 12 B.R. 654 (S.D. Ga. 1981), *aff'd sub nom.*

103. *In re Okoreeh-Baah*, 836 F.2d 1030, 1032 (6th Cir. 1988) (citing *Matter of Kull*, 12 B.R. 654 (S.D. Ga. 1981), *aff'd. sub nom.*).

104. *Kull*, 12 B.R. at 659.

- (1) The amount of income of the debtor and the debtor's spouse from all sources;
- (2) The regular and recurring living expenses for the debtor and his dependents;
- (3) The amount of the attorney's fees to be awarded in the case and paid by the debtor;
- (4) The probable or expected duration of the Chapter 13 plan;
- (5) The motivations of the debtor and his sincerity in seeking relief under the provisions of Chapter 13;
- (6) The ability of the debtor to earn and the likelihood of future increase or diminution of earnings;
- (7) Special situations such as inordinate medical expense, or unusual care required for any member of the debtor's family;
- (8) The frequency with which the debtor has sought relief under any section or title of the Bankruptcy Reform Act or its predecessor's statutes;
- (9) The circumstances with which the debtor has contracted his debts and his demonstrated bona fides, or lack of same, in dealing with his creditors;
- (10) Whether the amount or percentage of payment offered by the particular debtor would operate or be a mockery of honest, hard-working, well-intended debtors who pay a higher percentage of their claims consistent with the purpose and spirit of Chapter 13;
- (11) The burden which the administration of the plan would place on the trustee; and
- (12) The salutary rehabilitative provisions of the Bankruptcy Reform Act of 1978 which are to be construed liberally in favor of the debtor.

105. Hunt, *supra* note 89, at 408.

106. *In re Deans*, 692 F.2d 968 (4th Cir. 1982).

107. *In re Estus*, 695 F.2d 311 (8th Cir. 1982).

108. *Flygare v. Boulden*, 709 F.2d 1344 (10th Cir. 1983).

109. *In re Kitchens*, 702 F.2d 885 (11th Cir. 1983).

110. *In re Estus*, 695 F.2d at 317.

- (1) The amount of the proposed payments and the amount of the debtor's surplus;

Since the court in *Flygare* adopted this approach, it remains the controlling precedent within that district¹¹¹ despite having been criticized by treatise-writers¹¹² and another Court of Appeals.¹¹³ Critics of this factor approach outlined in *Deans*, *Estus*, *Flygare*, and *Kitchens* have argued, especially in the case of an above-median income debtor, that “much of the bankruptcy court’s discretion in determining whether a debtor’s plan may be confirmed has been eliminated.”¹¹⁴ At the same time, however, Congress retained the good faith requirement under § 1325(a)(3).¹¹⁵ A majority of other circuits, when analyzing a debtor’s conduct, use a similar flexible case-by-case approach.¹¹⁶ The Sixth Circuit, for example, has held that “a good faith determination under § 1325(a)(3) requires an inquiry into all . . . facts and circumstances of a debtor’s proposed plan.”¹¹⁷

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- (2) The debtor’s employment history, ability to earn and likelihood of future increases in income;
 - (3) The probable or expected duration of the plan;
 - (4) The accuracy of the plan’s statements of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court;
 - (5) The extent of preferential treatment between classes of creditors;
 - (6) The extent to which secured claims are modified;
 - (7) The type of debt sought to be discharged and whether any such debt is nondischargeable in Chapter 7;
 - (8) The existence of special circumstances such as inordinate medical expenses;
 - (9) The frequency with which the debtor has sought relief under the Bankruptcy Reform Act;
 - (10) The motivation and sincerity of the debtor in seeking Chapter 13 relief; and
 - (11) The burden which the plan’s administration would place upon the trustee.

111. *In re Sandberg*, 433 B.R. 837, 842-43 (Bankr. D. Kan. 2010) (“See *In re Martin*, 373 B.R. 731 (Bankr. D. Utah 2007) (applying *Flygare* good faith analysis in post-BAPCPA case.); *In re Sandberg*, 433 B.R. 837, 842 (Bankr. D. Kan. 2010) (outlines *Flygare* factors).”).

112. *Id.* at 842 (citing Keith M. Lundin & William H. Brown, CHAPTER 13 BANKRUPTCY, 4th ed. § 177.1 at ¶4, Sec. Rev. July 23, 2004, and § 197.1 at ¶3, Sec. Rev. Jun 7, 2004, www.Ch13online.com.).

113. *In re Sandberg*, 433 B.R. at 842-43 (“See *Keach v. Boyajian (In re Keach)*, 243 B.R. 851, 868-71 (1st Cir. BAP 2000) (Courts analyze debtor’s honesty in fact in applying the lack of good faith standard)”).

114. *Id.* at 843 (“The disposable income test for above-median income debtors and the manner in which disposable income is calculated is specified in § 1325(b)(2) and (3).”).

115. *Id.*

116. *In re Okoreeh-Baah*, 836 F.2d 1030, 1033 (“See, e.g., *Matter of Chaffin*, 816 F.2d 1070, 1074 (5th Cir. 1987); *In re Johnson*, 708 F.2d 865, 868 (2d Cir. 1983); *In re Kitchens*, 702 F.2d 885, 888-89 (11th Cir. 1983); *In re Estus*, 695 F.2d 311, 316-17 (8th Cir. 1982); *Deans v. O’Donnell*, 692 F.2d 968, 972 (4th Cir. 1982); *In re Goeb*, 675 F.2d 1386, 1389-90 (9th Cir. 1982); *In re Rimgale*, 669 F.2d 426, 431 (7th Cir. 1982).”).

117. *Id.* (“The following are a sampling of cases which hold that a good faith determination under § 1325(a) requires an inquiry into all facts and circumstances of a debtor’s proposed plan. See, e.g., *In re Harkai*, 68 B.R. 990, 992-93 (Bankr. E.D. Mich.1987); *Matter of Davis*, 68 B.R. 205,

Whether a court adopts one of the above mentioned factor analysis tests or creates its own, the overarching goal of this inquiry remains the same, to determine whether “there has been an abuse of the provisions, purpose, or spirit of Chapter 13 in the proposal of a plan.”¹¹⁸ This requirement is not meant to stifle an attorney’s creativity.¹¹⁹ In fact, “[l]egal creativity, when applied in good faith, should not be stifled.”¹²⁰ Furthermore, a debtor may still propose an aggressive Chapter 13 plan without it constituting bad faith.¹²¹ It is for reasons like this that good faith must be considered on a case-by-case basis, taking into consideration the totality of the circumstances.¹²² Whether the totality of the circumstances test is described as “flexible” or “arbitrary,” the outcome remains heavily dependent upon the way the judge in each specific case views and analyzes the facts and how the judge exercises his/her discretion.¹²³

V. SPLIT IN COURTS

In *Baud v. Carroll*¹²⁴, the Sixth Circuit acknowledged that there is a split in courts as to whether Social Security benefits are a factor included in the good faith analysis of § 1325(a)(3).¹²⁵ While the Sixth Circuit

213-14 (Bankr. S.D. Ohio 1987); *In re Stevens*, 25 B.R. 664, 666 (Bankr. S.D. Ohio 1982); *In re Esser*, 22 B.R. 814, 818 (Bankr. E.D. Mich.1982); *St. Luke Parish Fed. Credit Union v. Wourms*, 14 B.R. 169, 170, 171 (Bankr. S.D. Ohio 1981); *In re Belka*, 13 B.R. 607, 609 (Bankr. W.D. Mich.1981); *In re Polak*, 9 B.R. 502, 510 (W.D. Mich. 1981); *In re Burchett*, 8 B.R. 473, 474 (Bankr. S.D. Ohio 1981); *In re Granger*, 7 B.R. 14, 15 (Bankr. S.D. Ohio 1980); *In re Blackwell*, 5 B.R. 748, 751 (Bankr. W.D. Mich.1980); *In re Moss*, 5 B.R. 123, 125 (Bankr. M.D. Tenn.1980); *In re Johnson*, 5 B.R. 40, 42 (Bankr. S.D. Ohio 1980).”).

118. *Bein*, *supra* note 21, at 676 (citing *Neufeld v. Freeman (In re Freeman)*, 794 F.2d 149, 152 (4th Cir. 1986); *N.J. Lawyers’ Fund for Client Protection v. Goddard (In re Goddard)*, 212 B.R. 233, 240 (Bankr. D. N.J. 1997)).

119. *In re Schnabel*, 153 B.R. 809, 820-21 (Bankr. N.D. Ill. 1993) (“*See In re KTMA Acquisition Corp.*, 153 B.R. 238, 250 (Bankr. D. Minn. 1993) (Rule 9011 not intended to chill creative legal theories)”).

120. *Id.* at 820.

121. *Id.* at 821.

122. *Bein*, *supra* note 21, at 676 (“*See In re Smith*, 286 F.3d 461, 466 (7th Cir. 2002); *Mason v. Young (In re Young)*, 237 F.3d 1168, 1174-75 (10th Cir. 2001); *Solomon v. Cosby (In re Solomon)*, 67 F.3d 1128, 1134 (4th Cir. 1995); 550 W. Ina Road Trust v. Tucker (*In re Tucker*), 989 F.2d 328, 330 (9th Cir. 1993); *Handeen v. LeMaire (In re LeMaire)*, 898 F.2d 1346, 1349 (8th Cir. 1990); *Metro Employees Credit Union v. Okoreeh-Baah (In re Okoreeh-Baah)*, 836 F.2d 1030, 1031 (6th Cir. 1988); *Public Fin. Corp. v. Freeman*, 712 F.2d 219, 221 (5th Cir. 1983); *Ravenot v. Rimgale (In re Rimgale)*, 669 F.2d 426, 432 (7th Cir. 1982).”).

123. Chapter 13 Practice & Procedures § 9B:31.

124. *Baud v. Carroll*, 634 F.3d 327 (6th Cir. 2011).

125. *Id.* at n.13. (“Courts are split on the issue of whether a bankruptcy court may consider an above-median-income debtor’s decision to not commit available Social Security benefits to

chose not to rule on this issue, *Baud* serves as evidence that this issue has become an important debate among courts and is an issue that needs immediate attention.¹²⁶ This section will first analyze the decisions of courts that have held that Social Security benefits are not a factor included in the good faith analysis of § 1325(a)(3). After analyzing these holdings, this section will then review the decisions of courts that have held that Social Security benefits are a factor included in the good faith analysis of § 1325(a)(3). The purpose of this section is to explore the “split in courts” that the Sixth Circuit acknowledged in *Baud*. These cases will provide a foundation for Part VI where I advocate for why courts should adopt the stance that a debtor’s decision not to commit available Social Security benefits to unsecured creditors should be included in the good faith analysis under § 1325(a).

A. *Some Courts Have Held that Social Security Benefits Are Not a Factor Included in the Good Faith Analysis of § 1325(a)(3)*

This section canvasses decisions of courts that held that a debtor’s Social Security benefits should not be included in the good faith analysis. These courts primarily rely on arguments that it would be both meaningless and duplicative to include Social Security benefits in the

unsecured creditors in the good-faith analysis under 11 U.S.C. § 1325(a)(3). *Cf. Fink v. Thompson* (*In re Thompson*), 439 B.R. 140, 142-43 (8th Cir. BAP 2010) (holding that debtors’ exclusion of Social Security benefits as source of payment under Chapter 13 plan could not be considered in good-faith analysis), and *Barfknecht*, 378 B.R. at 164 (“[W]hether plan payment must include income derived from Social Security benefits is already specifically addressed elsewhere in the Bankruptcy Code. The trustee’s proposed reading of the good-faith standard would swallow up these other explicit statutory treatments, effectively rendering them nullities”), with *Bartelini*, 434 B.R. at 297 (holding that a debtor’s decision to not commit Social Security benefits to pay unsecured creditors may be “considered as one of many factors under a totality of the circumstances inquiry to determine good-faith”), and *Upton*, 363 B.R. at 536 (same).”). In addition, the U.S. Bankruptcy Court for the Northern District of Indiana, Fort Wayne Division, also recently acknowledged this split among courts. *See In re Wheeler*, No. 09-13597, 2013 WL 6922768, *2 (N.D. Ind. Dec. 18, 2013) (“[T]he reported decisions are divided over whether and how social security income is considered in determining how much a [C]hapter 13 debtor is required to pay creditors. Some say it is. *See, Mains v. Foley*, 2012 WL 612006, *5 (W.D. Mich. 2012); *In re Thomas*, 443 B.R. 213, 218 (Bankr. N.D. Ga. 2010); *In re Westing*, 2010 WL 2774826 at *2-3 (Bankr. D. Idaho 2010); *In re Upton*, 363 B.R. 528, 536-37 (Bankr. S.D. Ohio 2007). Others say it is not. *See In re Cranmer*, 697 F.3d 1314, 1317 (10th Cir. 2012); *In re Ragos*, 700 F.3d 220, 223 (5th Cir. 2012); *In re Thompson*, 439 B.R. 140 (8th Cir. BAP 2010). *See also, In re Ward*, 359 B.R. 741, 745 (Bankr. W.D. Mo. 2007) ([S]ocial [S]ecurity income not considered, but must still be disclosed). Neither this court nor the Seventh Circuit has decided the issue.”).

126. *Baud*, 634 F.3d 327 at n.13 (“Because the Appellees have chosen to devote Social Security benefits to unsecured creditors, this good-faith issue is not before us today.”).

good faith analysis. In section VI.A, this Comment will explore these arguments in detail. In section VI.B, the Comment will reject this approach in favor of an approach that permits courts to consider, as one factor in the good faith analysis, whether the debtor elected to exclude Social Security benefits.

Eighth Circuit. The Eighth Circuit's decision in *In re Thompson*¹²⁷ is the leading case for courts adopting the position that Social Security benefits are not a factor courts should consider in analyzing the good faith analysis under § 1325. In *In re Thompson*, a Chapter 13 trustee objected to confirmation of debtors' proposed plan on the grounds that it did not meet the Bankruptcy Code's good faith standard.¹²⁸ The United States Bankruptcy Court for the Western District of Missouri confirmed the plan.¹²⁹ The trustee appealed.¹³⁰ The United States Bankruptcy Appellate Panel of the Eighth Circuit affirmed.¹³¹

In so ruling, the court found it "would . . . render § 1325(b)'s ability to pay test meaningless" if "debtors' exclusion of their Social Security [benefits] from their plan payments" was part of the good faith analysis.¹³² Furthermore, it would be duplicative to consider such conduct by the debtors under the good faith analysis, since it is already considered under the ability to pay test.¹³³

Tenth Circuit. The Tenth Circuit agreed with the Eighth Circuit in its decision *In re Cranmer*,¹³⁴ where a Chapter 13 trustee objected to an above-median-income debtor's amended plan on the grounds that the debtor excluded Social Security benefits from his projected disposable income.¹³⁵ The bankruptcy court denied confirmation of the plan.¹³⁶ In so denying confirmation, the bankruptcy court held that the Social Security benefits must be included in the projected disposable income calculation and the debtor's failure to do so meant the debtor did not propose the plan in good faith.¹³⁷ The debtor appealed.¹³⁸ The district

127. *In re Thompson*, 439 B.R. 140 (B.A.P. 8th Cir. 2010).

128. *Id.* at 141.

129. *Id.*

130. *Id.*

131. *Id.* at 144.

132. *Id.* at 143 (citing *In re Barfknecht*, 378 B.R. 154, 164 (Bankr. W.D. Tex. 2007)).

133. *In re Thompson*, 439 B.R. at 143.

134. *In re Cranmer*, 697 F.3d 1314 (10th Cir. 2012).

135. *Id.* at 1315-16.

136. *Id.* at 1315.

137. *Id.*

138. *Id.*

court reversed.¹³⁹ The appellate court affirmed the district court's order.¹⁴⁰

In so concluding, the Tenth Circuit held that Social Security benefits need not be included in the calculation of projected disposable income, and that the debtor's failure to include Social Security benefits is not a ground for finding the debtor did not propose the plan in good faith.¹⁴¹ In evaluating the debtor's good faith, the Tenth Circuit considered eleven non-exclusive factors as well as other relevant circumstances.¹⁴² The court held that "[w]hen a Chapter 13 debtor calculates his repayment plan payments exactly as the Bankruptcy Code and the Social Security Act allow him to, and thereby excludes [Social Security benefits], that exclusion cannot constitute a lack of good faith."¹⁴³ Therefore, the court held, it cannot be bad faith for a debtor to adhere to the Bankruptcy Code provisions.¹⁴⁴

Fifth Circuit. The Fifth Circuit weighed in on this split in *In re Ragos*.¹⁴⁵ In *In re Ragos*, a Chapter 13 trustee objected to the confirmation of debtors' proposed plan on the grounds the debtors failed to devote their full Social Security benefits to their plan, which showed a lack of good faith.¹⁴⁶ The bankruptcy court rejected the trustee's objection based on the language of the Bankruptcy Code and Social Security Act that show a clear intent to exclude Social Security benefits.¹⁴⁷ The trustee appealed.¹⁴⁸ The appellate court affirmed.¹⁴⁹

In affirming, the Fifth Circuit held that failure to use Social Security benefits did not constitute "evidence the [d]ebtors have acted in bad faith or seek any improper result."¹⁵⁰ Having already concluded that debtors' plan fully complied with the Bankruptcy Code, the Fifth Circuit held that it was apparent that the debtors' plan was not in bad faith merely for abiding by what the Code permits debtors to do.¹⁵¹ In so holding, the Fifth Circuit held that "retention of exempt [S]ocial

139. *Id.*

140. *In re Cranmer*, 697 F.3d at 1315.

141. *Id.*

142. *Id.* at 1318-19.

143. *Id.* at 1319.

144. *Id.*

145. *In re Ragos*, 700 F.3d 220 (5th Cir. 2012).

146. *Id.* at 222.

147. *Id.*

148. *Id.*

149. *Id.* at 227.

150. *Id.*

151. *In re Ragos*, 700 F.3d at 227.

[S]ecurity benefits alone is legally insufficient to support a finding of bad faith under the Bankruptcy Code.”¹⁵²

Middle District of Florida. The United States District Court for the Middle District of Florida reached a similar conclusion in *In re Vandenbosch*,¹⁵³ where a Chapter 13 debtor’s plan was denied by the Bankruptcy Court on the theory that the debtor failed to satisfy the “projected disposable income” test by not including his and his wife’s Social Security benefits.¹⁵⁴ The Bankruptcy Court concluded that a Chapter 13 plan must include Social Security benefits as projected disposable income, which will be applied to payments for unsecured creditors.¹⁵⁵ The debtor appealed.¹⁵⁶ The United States District Court for the Middle District of Florida, Fort Myers Division reversed and remanded.¹⁵⁷

In reversing, the court relied upon the definition of “disposable income,” which is the “current monthly income received by the debtor . . . less amounts reasonably necessary to be expended for maintenance and support.”¹⁵⁸ Since current monthly income is defined to exclude Social Security benefits, Chapter 13 plans need not require that Social Security benefits be included as projected disposable income.¹⁵⁹ Refusal by the Bankruptcy Court to amend the plan because the debtor failed to include Social Security benefits was, therefore, an “error in law” and could not serve as a finding of bad faith.¹⁶⁰

Bankruptcy Court for the Western District of Texas. In *In re Barfknecht*,¹⁶¹ a Chapter 13 trustee objected to debtors’ proposed Chapter 13 plans because the trustee claimed the debtors failed to devote more of their Social Security benefits to payment of unsecured claims.¹⁶² The Bankruptcy Court for the Western District of Texas concluded that Social Security benefits are not a component of projected disposable income, and retaining these benefits rather than using them to pay creditors’ claims does not constitute bad faith.¹⁶³

152. *Id.*

153. *In re Vandenbosch*, 459 B.R. 140 (M.D. Fla. 2011).

154. *Id.* at 141.

155. *Id.*

156. *Id.*

157. *Id.* at 144.

158. *Id.* at 142 (citing 11 U.S.C. § 1325(b)(2)).

159. *In re Vandenbosch*, 459 B.R. at 143-44.

160. *Id.*

161. *In re Barfknecht*, 378 B.R. 154 (W.D. Tex. 2007).

162. *Id.*

163. *Id.* at 155.

In so holding, the court applied the “totality of circumstances” test.¹⁶⁴ In addition, the court reasoned that Social Security benefits are specifically excluded as income of the debtor for “purposes of satisfying the debtor’s ability to pay test.”¹⁶⁵ Therefore, it struck the court as “an odd reading of the Code indeed to conclude that a debtor’s *following* of the Code, without more, could constitute abuse of the bankruptcy process.”¹⁶⁶ The court reasoned that over-reading the good faith standard in this way would ignore or overrule entire sections of the Code.¹⁶⁷

Bankruptcy Court for the Northern District of New York. Finally, in *In re Rotunda*,¹⁶⁸ a Chapter 13 trustee objected to a proposed plan by an above-median-income debtor for failing to satisfy the “projected disposable income” test.¹⁶⁹ The Bankruptcy Court denied the trustee’s objection to the amended plan.¹⁷⁰

The court found that “it is critical to remember that a debtor is still required to propose a plan which meets the standards of good-faith, as set forth in Code § 1325(a)(3).”¹⁷¹ In doing so, the court relied on the argument that it was Congress who decided to “exclude Social Security benefits from the payment of unsecured creditors’ claims, even in a [C]hapter 13 [case].”¹⁷² While the court questioned this policy, it recognized that it is Congress’s role to change the law, not the courts.¹⁷³

164. *Id.* at 164-65. (“In applying this test, [t]he trick seems to be not placing too much weight on any single factor, but in the court’s looking at how a number of factors in any given case operate together to betray a plan proposed in bad faith.” *In re McLaughlin*, 217 B.R. at 775-76 (citing L. Clark & S. Lane, *Having Faith in Good Faith Analysis*, 683 PLI/COMM. 669 (Practicing Law Institute 1994).”). The court recognized that the purpose of the good faith analysis test under § 1325(a)(3) is to prevent abuse of the bankruptcy process. *Id.*

165. *Id.* at 165.

166. *Id.* (emphasis in sic).

167. *In re Barfknecht*, 378 B.R. at 165 (citing *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 579-80 (1994); *Miller v. Albright*, 523 U.S. 420, 456 (1998) (Scalia, J. concurring)).

168. *In re Rotunda*, 349 B.R. 324 (Bankr. N.D. N.Y. 2006).

169. *Id.*

170. *Id.* at 333.

171. *Id.* at 331.

172. *Id.* at 332-33.

173. *Id.* (“If this was not Congress’[s] intent, then it is up to Congress to rectify the situation. It was also Congress’[s] decision to exclude Social Security benefits, from the payment of unsecured creditors’ claims even in a chapter 13 context. This is a policy decision that the Court may perhaps question, but it cannot alter. That is the role of Congress.”).

B. Other Courts Have Held that Social Security Benefits Are a Factor Included in the Good Faith Analysis of § 1325(a)(3)

This section explores courts' decisions that have concluded that the debtor's choice to include or exclude Social Security benefits should be considered as a factor in a court's good faith analysis. This Comment will explore the rationale underlying use of the debtor's election in detail in section VI.B and will ultimately conclude that courts should adopt this approach.

Bankruptcy Court for the Western District of Michigan. In *In re Mains*,¹⁷⁴ debtors filed motions for leave to appeal decisions to deny confirmation of their Chapter 13 plan, and to stay further proceedings during the appeal.¹⁷⁵ The debtors began their bankruptcy proceedings more than a year and a half before this appeal seeking relief under Chapter 7.¹⁷⁶ The court dismissed the debtors' original claim finding that the debtors' financial circumstances constituted abuse.¹⁷⁷ The debtors then converted their claim into one under Chapter 13 instead.¹⁷⁸ The Bankruptcy Court denied the debtors' plan based upon a determination that the plan did not reflect good faith.¹⁷⁹ The debtors appealed.¹⁸⁰ The United States District Court, Western District of Michigan affirmed the dismissal of the debtors' plan.¹⁸¹ The debtors motioned for leave to appeal the district court's decision.¹⁸² The United States Bankruptcy Court, Western District of Michigan, denied these motions.¹⁸³

In its opinion, the court acknowledged that the Sixth Circuit had not weighed in on the split within the courts on the issue of whether Social Security benefits may be considered in the good faith analysis under 11 U.S.C. § 1325(a)(3).¹⁸⁴ Absent a Sixth Circuit decision, the court found that a number of Sixth Circuit decisions indicate there is "no reason why

174. *In re Mains*, 451 B.R. 428 (Bankr. W.D. Mich. 2011); The U.S. W.D. Michigan Southern District affirmed this courts holding on Feb. 24, 2012, in *Mains v. Foley*, 1:11-CV-456, 2012 WL 612006 (W.D. Mich. Feb. 24, 2012).

175. *Id.* at 428.

176. *Id.* at 428-29.

177. *Id.* at 429; see 11 U.S.C. § 707(b)(3).

178. *Id.*

179. *Id.*

180. *In re Mains*, 451 B.R. at 429.

181. *Id.* at 437.

182. *Id.* at 428.

183. *Id.* at 428.

184. *Id.* at 434. ("Baud is correct that the Sixth Circuit has not yet decided what Social Security benefits should be included for purposes of determining Section 1325(a)(3) good faith . . .").

the Sixth Circuit would not take into consideration all of a debtor's income, including [S]ocial [S]ecurity benefits," in considering whether the debtor's plan was in good faith under § 1325(a).¹⁸⁵ In doing so, the court rejected the debtors' argument that they should be entitled to keep their Social Security benefits because they are elderly.¹⁸⁶ The court summed up their reasoning for denying the debtors' plan for lack of good faith with the old adage "pigs get fat, but hogs get slaughtered."¹⁸⁷

Bankruptcy Court for the Northern District of Georgia. The only reported Georgia bankruptcy decision to consider the issue of social security benefits and good faith is *In re Thomas*,¹⁸⁸ where a Chapter 13 trustee objected to an above-median-income debtor who sought plan confirmation on the grounds that the plan was not proposed in good faith.¹⁸⁹ The Bankruptcy Court denied the plan.¹⁹⁰

In so ruling, the court acknowledged the "strong tension" that existed between courts concerning whether a debtor's retention of Social Security benefits should be a part of the good faith analysis.¹⁹¹ While the court recognized that Social Security benefits are "vital to many Americans because [they] provide . . . predictable and certain benefits," the court nonetheless determined that Social Security benefits are income, and the debtor should not be allowed to shield that income from creditors.¹⁹² The court considered the totality of the circumstances and determined that the debtors were "paying nothing to unsecured creditors under the plan and at the same time [were] accumulating [S]ocial [S]ecurity benefits each month which totaled more than two times the plan payment."¹⁹³ Had the debtors included the Social Security benefits in the plan, it "would have resulted in a payment of [100 percent] to unsecured creditors [within twenty-one]-months."¹⁹⁴ This factor, the court held, went against established law and, therefore, was not made in good faith.¹⁹⁵

Bankruptcy Court for the Southern District of Ohio. Similarly,

185. *Id.*

186. *In re Mains*, 451 B.R. at 437.

187. *Id.* at 436 (quoting *In re Williams*, 394 B.R. 550, 573 (Bankr. D. Colo. 2008)).

188. *In re Thomas*, 443 B.R. 213 (Bankr. N.D. Ga. 2010).

189. *Id.*

190. *Id.* at 219.

191. *Id.*

192. *Id.* (citing *In re Devilliers*, 358 B.R. 849, 865-66 (Bankr. E.D. La. 2007)).

193. *In re Scott*, 488 B.R. 246, 257 (Bankr. M.D. Ga. 2013).

194. *Id.*

195. See *In re Green*, 09-44481-13, 2010 WL 8961439 (Bankr. W.D. Mo. Feb. 1, 2010); *In re Upton*, 363 B.R. 528 (Bankr. S.D. Ohio 2007).

in *In re Upton*,¹⁹⁶ a “Chapter 13 trustee objected to confirmation of debtors’ proposed plan, . . . contending that the plan was not proposed in good faith and did not satisfy [the] disposable income test.”¹⁹⁷ The Bankruptcy Court deferred ruling on the trustee’s objection to good faith to allow the debtors to amend their plan.¹⁹⁸

In so holding, the court considered the twelve factors¹⁹⁹ enumerated in *In re Caldwell*.²⁰⁰ Relying upon these factors, the court acknowledged the split within courts regarding the exclusion of Social Security benefits and how it affects the good faith analysis.²⁰¹ The court found that like many courts, “the Sixth Circuit . . . has specified the debtor’s income and surplus [are] factors [of] consideration in the determination of good faith.”²⁰² When Congress chose not to amend the requirement of good faith under § 1325 and the elements to be considered, knowing full well how courts have interpreted this requirement, then Congress “is presumed to be satisfied with the effect of the statute as applied by the courts.”²⁰³ Furthermore, the court found “Congress . . . indicated a clear intent to curb opportunistic filings and its displeasure with the practice of allowing debtors, who are able to repay

196. *In re Upton*, 363 B.R. 528 (Bankr. S.D. Ohio 2007).

197. *Id.*

198. *Id.* at 537.

199. *Id.* at 535-536 (The twelve factors enumerated in *In re Caldwell*, 895 F.2d 1123, 1126-27 (6th Cir. 1990) are:

- (1) the amount of the proposed payments and the amount of the debtor’s surplus;
- (2) the debtor’s employment history, ability to earn and likelihood of future increase in income;
- (3) the probable or expected duration of the plan;
- (4) the accuracy of the plan’s statements of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court;
- (5) the extent of preferential treatment between classes of creditors;
- (6) the extent to which secured claims are modified;
- (7) the type of debt sought to be discharged and whether any such debt is nondischargeable in Chapter 7;
- (8) the existence of special circumstances such as inordinate medical expenses;
- (9) the frequency with which the debtor has sought relief under Bankruptcy Reform Act;
- (10) the motivation and sincerity of the debtor in seeking Chapter 13 relief;
- (11) the burden which the plan’s administration would place under the trustee; and,
- (12) whether the debtor is attempting to abuse the spirit of the Bankruptcy Code.).

200. *Id.* (citing *In re Caldwell*, 895 F.2d 1123, 1126-27 (6th Cir. 1990)).

201. *Id.* at 536.

202. *In re Upton*, 363 B.R. at 536.

203. *Id.* (citing *Midlantic Nat’l Bank v N.J. Dep’t of Env’tl. Prot.*, 474 U.S. 494, 501 (1986) (“The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.”)).

their debts, to avoid their obligations to creditors.”²⁰⁴

Bankruptcy Court for the Northern District of New York. In *In re Bartelini*,²⁰⁵ a Chapter 13 trustee, relying on the Bankruptcy Court for the Southern District of Ohio’s decision in *Upton*,²⁰⁶ objected “to the confirmation of proposed Chapter 13 plans in three separate cases, disputing whether debtors had committed all of their projected disposable income.”²⁰⁷ The Bankruptcy Court overruled the trustee’s objection.²⁰⁸

In so holding, the court found that Chapter 13 “debtors cannot be compelled to include [Social Security] benefits in the computation of their [disposable income].”²⁰⁹ In relying upon *Upton*, the court agreed “that a debtor’s failure to commit [Social Security benefits] for purposes of repaying the maximum amount to creditors may be considered as one of many factors under a totality of circumstances inquiry to determine good faith.”²¹⁰

Bankruptcy Court for the District of Montana. Courts holding that a debtor’s decision to exclude available Social Security benefits from his/her proposed plan are not proposing a *per se* rule, but simply stating the exclusion of Social Security benefits as part of an individual’s proposed plan should be included in the “totality of circumstances” considered under the good faith analysis.²¹¹ In doing so, the court must then find this evidence is probative to find an individual’s proposed plan is lacking good faith.²¹² In *In re Welsh*,²¹³ a Chapter 13 trustee objected to the confirmation of a plan on the grounds that it was not proposed in good faith.²¹⁴ The United States Bankruptcy Court, District of Montana overruled these objections and confirmed the plan.²¹⁵

In so ruling, the court reviewed the “totality of the circumstances”

204. *Id.* (citing *In re Edmunds*, 350 B.R. 636, 649 (Bankr. D. S.C. 2006) (citing H.R. REP. NO. 109-31(1), at 5 (2005), U.S. CODE CONG. & ADMIN. NEWS 2005, at 88, 91-92)).

205. *In re Bartelini*, 434 B.R. 285 (Bankr. N.D. N.Y. 2010).

206. *In re Upton*, 363 B.R. 528 (Bankr. S.D. Ohio 2007).

207. *In re Bartelini*, 434 B.R. at 285.

208. *Id.* at 297.

209. *Id.* at 295.

210. *Id.* at 297.

211. *Mains v Foley*, 1:11-CV-456, 2012 WL 612006 at *6 (W.D. Mich. Feb. 24, 2012).

212. *In re Welsh*, 440 B.R. 836, 849 (Bankr. D. Mont. 2010) *aff’d*, 465 B.R. 843 (B.A.P. 9th Cir. 2012) (“[W]hile the Court considers David’s SSI benefits as one of the totality of circumstances, the Court does not consider the SSI benefits probative of a lack of good faith in proposing the Plan under § 1325(a)(3).”).

213. *In re Welsh*, 440 B.R. 836 (Bankr. D. Mont. 2010).

214. *Id.* at 838.

215. *Id.* at 851.

to determine whether the debtor's plan had been proposed in good faith.²¹⁶ In adopting the analysis from *Leavitt*,²¹⁷ the court determined that it should consider the debtor's Social Security benefits as one of the factors under the totality of circumstances test.²¹⁸ The court, however, found excluding the Social Security benefits was not probative of a lack of good faith in proposing a plan under § 1325(a)(3).²¹⁹ The court held the trustee's good faith objection on the basis of not including the Social Security benefits "cannot be sustained without running afoul of 42 U.S.C. § 407(a)" and canons of statutory construction²²⁰ because "overruling the good faith objection gives them effect without weakening § 1325(a)(3)."²²¹ Furthermore, the court determined considering lack of good faith regarding exclusion of Social Security benefits would be a similar situation to what the Eighth Circuit in *In re Thompson*²²² and the Supreme Court in *Lanning*²²³ faced when both held that "considering the same issue under the good faith test would be duplicative and render § 1325(b)'s ability to pay test meaningless."²²⁴

Bankruptcy Court for the District of South Carolina. In *In re*

216. *Id.* at 847 (citing *In re Leavitt*, 171 F.3d 1219, 1224-25 (9th Cir. 1999); *Eisen v Curry (In re Eisen)*, 14 F.3d 469, 470 (9th Cir. 1994); *In re Gress*, 257 B.R. 563, 567, 18 Mont. B.R. 30, 34 (Bankr. D. Mont. 2000)).

217. *In re Welsh*, 440 B.R. at 847 ("In *Leavitt*, the Ninth Circuit held that in determining whether a Chapter 13 plan has been proposed in good-faith, the court must consider (1) whether debtors misrepresented facts in their plan or unfairly manipulated the Code, (2) the debtors' history of filings and dismissals, (3) whether the debtors intended to defeat state court litigation, and (4) whether egregious behavior is present. *Leavitt*, 171 F.3d at 1224-25 (9th Cir. 1999); *Drummond v Cavanagh (In re Cavanagh)*, 250 B.R. 107, 114 (9th Cir. BAP 2000).").

218. *Id.* at 849.

219. *Id.*

220. The court addressed multiple statutory construction canons and policy rationale for why considering the Social Security benefits issue was not probative:

Courts generally avoid construing one provision in a statute so as to suspend or supersede another provision. *Rake v Wade*, 508 U.S. 464, 471-72 (1993). Courts should disfavor interpretations of statutes that render statutory language superfluous, and so long as there is no positive repugnancy, between two laws, a court must give effect to both. *Connecticut National Bank v Germain*, 503 U.S. at 252-54. Statutory construction canons require that 'where both a specific and a general statute address the same subject matter, the specific one takes precedence regardless of the sequence of the enactment, and must be applied first.' *In re Padilla*, 222 F.3d 1184, 1192 (9th Cir. 2000); *In re Khan*, 172 B.R. 613, 624 (Bankr. D. Minn. 1994) (citing *Busic v. United States*, 446 U.S. 398, 406 (1980) and *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973)).

Id. at 849-50.

221. *Id.* at 850.

222. *In re Thompson*, 439 B.R. 140 (8th Cir. 2010).

223. *Hamilton v. Lanning (In re Lanning)*, 560 U.S. 505 (2010).

224. *In re Welsh*, 440 B.R. 836, 850 (Bankr. D. Mont. 2010) *aff'd*, 465 B.R. 843 (9th Cir. 2012) *aff'd*, 711 F.3d 1120 (9th Cir. 2013).

Allawas,²²⁵ a Chapter 13 trustee objected to a debtor's plan that "proposed to make payments on a second vehicle, a motorcycle, by using the debtor's exempt Social Security [benefits]."²²⁶ Both "[t]he debtor and trustee stipulated . . . the debtor [satisfied] the projected disposable income test of § 1325(b)."²²⁷ The issue was, therefore, whether the debtors plan was proposed in good faith.²²⁸ The debtor argued that she voluntarily contributed a majority of her Social Security benefits to fund her proposed plan, even though she was not required to do so.²²⁹ In response, the trustee argued the creditors could have been paid more "if the expense for the motorcycle was prohibited, and, therefore," the plan was not proposed in good faith.²³⁰ Section 407 was not argued.²³¹

The United States Bankruptcy Court, District of South Carolina held that the debtor failed to meet her burden of demonstrating her plan was proposed in good faith.²³² After considering the totality of circumstances, the Court held that a factor indicting a lack of good faith was the debtor's decision to use her Social Security benefits to retain her motorcycle while only proposing a 1 percent repayment to her general creditors.²³³

VI. ANALYSIS

Courts should adopt the approach that a "bankruptcy court may consider an above-median-income debtor's decision not to commit available Social Security benefits to unsecured creditors in the good faith analysis under [section 1325]."²³⁴ To reach this conclusion, courts will have to parse through the Bankruptcy Code and the Social Security Act.²³⁵ Courts should do so with their focus on "whether the debtor is seeking to abuse the bankruptcy process," which is a standard used by several bankruptcy courts.²³⁶ To fully understand why courts should

225. *In re Allawas*, CIV A 07-06058-HB, 2008 WL 6069662 (Bankr. D. S.C. Mar. 3, 2008).

226. *In re Herrmann*, CA 10-06523-JW, 2011 WL 576753, *3 (Bankr. D. S.C. Feb. 9, 2011) (citing *In re Allawas*, CIV A 07-06058-HB, 2008 WL 6069662 (Bankr. D. S.C. 2008)).

227. *Id.*

228. *In re Allawas*, 2008 WL 6069662 at *1.

229. *Id.* at *2.

230. *In re Herrmann*, 2011 WL 576753 at *3.

231. *Id.*

232. *Id.*

233. *Id.*

234. *In re Baud*, 634 F.3d at 346 n.13.

235. *Mains v. Foley*, 2012 WL 612006 at *4.

236. *In re Cusano*, 431 B.R. 726, 735 (B.A.P. 6th Cir. 2010).

include the debtor's decision not to commit available Social Security benefits to unsecured creditors as one of the factors in the good faith analysis under § 1325, one must first understand the arguments opposed to allowing courts to consider this as a factor. In section VI.A, this Comment explores the arguments supporting exclusion of Social Security benefits from the court's good faith analysis.²³⁷ In Section VI.B, this Comment analyzes and rejects the arguments that favor excluding Social Security benefits from the good faith analysis and proposes an analysis in which courts would consider as a factor in the good faith analysis a debtor's decision to exclude Social Security benefits from his/her proposed plan.²³⁸

A. *Arguments Opposing Inclusion of Social Security Benefits in the Good Faith Analysis*

Proponents of not including Social Security benefits within the good faith analysis assert two major arguments as to why failure to commit Social Security benefits should not be included in the good faith analysis: (1) it would be meaningless and duplicative and (2) Congress has already excluded Social Security benefits from the payment of creditors when it defined "disposable income."

1. *It Would Be Meaningless and Duplicative to Consider the Debtor's Decision Not to Commit Social Security Benefits to Creditors Under the Good Faith Analysis*

"Several courts have held that . . . the good faith standard should not be expanded [so as] to alter the statutory treatment of [a particular] issue" that has already been specifically addressed within the Bankruptcy Code.²³⁹ This approach is rooted in the rationale that the

237. See *infra* section VI.A.

238. See *infra* section VI.B.

239. *In re Barfknecht*, 378 B.R. 154, 164-165 (Bankr. W.D. Tex. 2007) (See, e.g., *Matter of Smith*, 848 F.2d 813, 820-21 (7th Cir. 1988) ("Since Congress has now dealt with the issue quite specifically in the ability-to-pay provision, there is no longer any reason for the amount of a debtor's payments to be considered as even part of the good faith standard."); *In re Alexander*, 344 B.R. at 752 (agreeing with another court that "the debtor's disposable income must be determined under § 1325(b) and not as an element of good faith under § 1325(a)(3)") (citing *In re Barr*, 341 B.R. at 186 and Marianne B. Culhane & Michaela M. [165] White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. REV. 665, 681 (2005)); see also *In re Rotunda*, 349 B.R. at 333 (denying a chapter 13 trustee's objection based on Congress'[s] policy decision in amending section 1325); see also 8 COLLIER'S ON BANKRUPTCY P 1325.04[1] (15th ed. 2007).").

“Bankruptcy Code specifically [excludes] Social Security benefits . . . as income of the debtor for purposes of satisfying the debtor’s ability to pay test.”²⁴⁰ Therefore, it would be “an odd reading of the Code . . . to conclude that a debtor’s *following* of the Code, without more, could constitute abuse of the bankruptcy process.”²⁴¹

Relying upon this argument, proponents of not including Social Security benefits within the good faith analysis assert that “[w]hen a Chapter 13 debtor calculates his repayment plan payments exactly as the Bankruptcy Code and the Social Security Act allow him to, and thereby excludes [Social Security benefits], that exclusion cannot constitute a lack of good faith.”²⁴² As the Ninth Circuit stated in *Drummond v. Welsh*,²⁴³

[T]he fact that a debtor excludes income from the disposable income calculation that Congress specifically allows the debtor to exclude is not, by itself, probative of a lack of good faith. We reject the reasoning of the cases that say that, because Social Security payments are intended to provide for a recipient’s basic needs, a debtor must use the benefit payments to provide for those basic needs, thereby freeing up other, non-exempt income, for plan payments. E.g., *In re Hall*, 442 B.R. 754 (Bankr. D. Idaho 2010). This approach simply does by indirection what the Code says cannot be done, which is to include Social Security benefit payments in a debtor’s disposable income calculation.²⁴⁴

A holding to the contrary “would render the Code’s express exclusion of [Social Security benefits] from the calculation of the debtor’s disposable income, and thereby, its exclusion of [Social Security benefits] from the calculation of the debtor’s projected disposable income, meaningless.”²⁴⁵

In addition to rendering §1325(b)’s ability to pay test meaningless, proponents of excluding Social Security benefits within the good faith

240. *Id.* at 165.

241. *Id.* (emphasis in sic).

242. *Anderson v. Cranmer* (*In re Cranmer*), 697 F.3d 1314, 1319 (10th Cir. 2012) (“*See Drummond v. Welsh* (*In re Welsh*), 465 B.R. 843, 856 (B.A.P. 9th Cir. 2012) (holding the exclusion of SSI from the projected disposable income calculation, which § 407 and the Bankruptcy Code expressly allow for, ‘is not, by itself, probative of a lack of good faith’); *Fink v. Thompson* (*In re Thompson*), 439 B.R. 140, 144 (B.A.P. 8th Cir. 2010) (‘Standing alone, the Debtors’ retention of Social Security income is insufficient to warrant a finding of bad faith under § 1325(a)(3)’).”.

243. *Drummond v. Welsh* (*In re Welsh*), 465 B.R. 843 (B.A.P. 9th Cir. 2012).

244. *Id.* at 856.

245. *In re Cranmer*, 697 F.3d 1314, 1319 (citing *Fink v. Thompson* (*In re Thompson*), 439 B.R. at 14; “*see also Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998) (‘[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.’)”).

analysis argue that “the ability to pay test already addresses whether the Social Security [benefits] need . . . to be included in a debtor’s plan payments[,] [and] [c]onsidering the same issue under the good faith test would be duplicative.”²⁴⁶

2. The Exclusion Approach Argues Congress Has Already Excluded Social Security Benefits from the Payment of Creditors When It Defined “Disposable Income”

A number of courts have concluded that “[t]he plain language of the Bankruptcy Code specifically excludes Social Security [benefits] from a debtor’s required payments in a Chapter 13 plan.”²⁴⁷ Section 101(10A)(A) defines “‘current monthly income’ . . . as the ‘average of ‘all sources’ of the debtor’s monthly income during the previous six-month period.’”²⁴⁸ More importantly, in subsection (B), the statutory definition of “current monthly income” explicitly “excludes benefits received under the Social Security Act.”²⁴⁹ Section 1325(b)(2) defines “disposable income” as “current monthly income less amounts reasonably necessary for maintenance and support.”²⁵⁰ Therefore, Chapter 13 plans need not provide that Social Security benefits be included as projected disposable income.²⁵¹

Courts originally included Social Security benefits within their calculation of disposable income.²⁵² With the enactment of BAPCPA,

246. *In re Thompson*, 439 B.R. at 143; *In re Edmunds*, 350 B. R. 636 (“See *In re Barr*, 341 B.R. 181, 184 (Bankr. M.D. N.C. 2006) (determining § 1325(b) controls whether a debtor is devoting sufficient income to their plan); *In re Alexander*, 344 B.R. 742, 752 (Bankr. E.D. N.C. 2006) (in accord). But see, *In re Johnson*, 346 B.R. 256, 264 (Bankr. S.D. Ga. 2006) (finding § 1325(b) alters good faith but does not eliminate a good faith inquiry into the sufficiency of income”).

247. *In re Thompson*, 439 B.R. at 142.

248. *In re Ragos*, 700 F.3d at 223 (citing 11 U.S.C. § 101(10A)(A)).

249. *In re Ragos*, 700 F.3d at 223 (citing 11 U.S.C. § 101(10A)(B) (“The term ‘current monthly income’—. . . (B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor’s spouse), on a regular basis for the household expenses of the debtor or the debtor’s dependents (and in a joint case the debtor’s spouse if not otherwise a dependent), but excludes benefits received under the Social Security Act[]. . .”).

250. *In re Vandenbosch*, 459 B.R. 140, 143 (M.D. Fla. 2011) (citing 11 U.S.C. § 1325(b)(2)).

251. *Id.* at 143-44.

252. *Id.* at 143 (“Prior to the enactment of BAPCPA, Social Security benefits were typically included in the calculation of disposable income. *Baud v. Carroll*, 634 F.3d 327, 347 (6th Cir. 2011). See, e.g., *In re Hagel*, 171 B.R. 686, 689 (Bankr. D. Mont. 1994) (In a Chapter 13 case, debtor’s “exempt income must be included when determining ‘disposable income.’”); *In re Shields*, 322 B.R. 894, 898 (Bankr. M.D. Fla. 2005) (Social Security benefits “should be treated as ‘income’ for purposes of determining whether a debtor has ‘disposable income’ under § 1325 of the Bankruptcy Code, even though such benefits are exempt from the claims of the debtor’s

however, there was a clear indication of an intended departure from this when Congress amended the definition of “disposable income.”²⁵³ Putting the statutory definitions together:

“Projected disposable income” is a forward-looking approach consisting of the average monthly income from all sources, without regard to taxability, derived during the 6-month period preceding the filing of the bankruptcy petition, less amounts necessary to be expended for maintenance, but excluding benefits received under the Social Security Act.²⁵⁴

Going beyond the plain language of the Bankruptcy Code, proponents of excluding Social Security benefits within the good faith analysis also focus their argument on the Social Security Act § 407(a).²⁵⁵ Section 407(a), which was enacted prior to the Bankruptcy Code,²⁵⁶ provides: “(a) . . . [N]one of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.”²⁵⁷ In relying upon § 407(a), the opposing approach asserts that § 407(a) makes it clear that Social Security benefits are not subject to bankruptcy law.²⁵⁸

However, after its original enactment, there was confusion regarding § 407(a), which led to some courts incorporating Social Security benefits into income for purposes of Chapter 13 bankruptcy.²⁵⁹ As a result, a second provision in § 407(b) of the Social Security Act was enacted.²⁶⁰ This second provision states: “No other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this

creditors.””).

253. *Id.* (citing *Baud v. Carroll*, 634 F.3d at 347 (citing *Lanning*, 560 U.S. 505 (2010))).

254. *Id.*

255. *Beaulieu v. Ragos* (*In re Ragos*), 700 F.3d 220, 223 (5th Cir. 2012).

256. *Id.* (“The first provision, Social Security Act § 407(a), was enacted in 1935, long before the enactment of the Bankruptcy Code.”).

257. 42 U.S.C. § 407(a).

258. *In re Ragos*, 700 F.3d at 223.

259. *Id.* at 223-224 (“Despite this explicit statutory language, some courts however failed to read the § 407(a) as exempting Social Security benefits from income available to pay creditors in Chapter 13 bankruptcy proceedings. According to a 1983 House Conference Report, ‘based on the legislative history of the Bankruptcy Reform Act of 1978, some bankruptcy courts ha[d] considered Social Security and [Social Security Income] benefits listed by the debtor to be income for purposes of a Chapter XIII bankruptcy.’” (citing H.R. REP. No. 98-25, pt. 1, (1983), *reprinted in* 1983 U.S.C.C.A.N. 219, 302)).

260. *Id.* at 224.

section.”²⁶¹ Therefore, any laws enacted after § 407 must expressly cite to § 407 so as to overcome the Social Security benefits exemption from bankruptcy law.²⁶²

The exclusion of Social Security benefits approach argues that reading the Bankruptcy Code and the two provisions of the Social Security Act together shows a clear intent by Congress to protect individuals’ Social Security payments from being subject to bankruptcy proceedings.²⁶³

B. Arguments for Including a Debtor’s Failure to Include Social Security Benefits as a Factor Under the Good Faith Analysis Test

While proponents of excluding Social Security benefits within the good faith analysis make valid claims, other courts conclude that they are misguided and rest their arguments upon a “misunderstanding of the interplay between the good faith test of section 1325(a), and the objective ‘disposable income’ test of section 1325(b).”²⁶⁴ Therefore, other courts suggest that the prevailing approach that courts should apply is that an above-median-income debtor’s decision not to commit available Social Security benefits to unsecured creditors should be included as one of the factors of the good faith analysis test. This approach is deeply rooted in the old adage “pigs get fat, but hogs get slaughtered.”²⁶⁵

*1. Courts Should Start by Analyzing the Language of the Bankruptcy Code Itself*²⁶⁶

As § 1325(a) is currently written, there is nothing that purports to limit the factors a bankruptcy court may consider in evaluating whether a plan was proposed in good faith or not.²⁶⁷ In fact, “case law confirms the open-ended scope of the good faith test as an ultimately subjective determination based on all facts and circumstances.”²⁶⁸ This point was

261. 42 U.S.C. § 407(b).

262. *In re Ragos*, 700 F.3d at 224.

263. *Id.*

264. *Mains v. Foley*, 2012 WL 612006 at *5 (W.D. Mich. 2012).

265. *In re Mains*, 451 B.R. 428, 436 (Bankr. W.D. Mich. 2011) (quoting *In re Williams*, 394 B.R. 550, 573 (Bankr. D. Colo. 2008)).

266. *Mains v. Foley*, 2012 WL 612006 at *4.

267. *Id.*

268. *Id.* at *4; *Id.* at *3 (“*In re Cusano*, 431 B.R. 726, 735 (B.A.P. 6th Cir. 2010); *In re Condon*, 358 B.R. 317, 326 (B.A.P. 6th Cir. 2007) (“Because good faith is an ‘amorphous notion’ it is impossible to identify the ‘infinite variety of factors’ that might weigh in the ‘good faith

reinforced in the 2005 BAPCPA amendments when Congress “expressly exclud[ed] Social Security benefits from the objective ‘disposable income’ analysis of section 1325(b), but [left] undisturbed the open-ended and unqualified subjective determination of good faith under section 1325(a).”²⁶⁹ Therefore, it is entirely possible for a debtor to propose a plan that meets § 1325(b)’s objective test, and at the same time fails to meet the standards of § 1325(a)’s subjective good faith analysis.²⁷⁰

This argument alone persuaded the Southern District of Ohio to hold that Social Security benefits were a factor courts may consider in the good faith analysis.²⁷¹ In *In re Upton*,²⁷² the court noted that “[t]he amendments wrought by BAPCPA did not change the requirement that a [C]hapter 13 plan be proposed in good faith.”²⁷³ The court reasoned that the Sixth Circuit and “‘many other courts’ have long considered the amount of the proposed payments and amount of debtor’s surplus a proper factor for a court to consider in the good faith analysis.”²⁷⁴ Therefore, “Congress, armed with the knowledge of that interpretation, did not amend the requirement of good faith contained in § 1325, or the elements to be considered in that analysis,” and therefore “is presumed to be satisfied with the effect of the statute as applied by the courts.”²⁷⁵ Furthermore, “Congress . . . indicated a clear intent to curb opportunistic filings and its displeasure with the practice of allowing debtors, who are able to repay their debts, to avoid their obligations to creditors.”²⁷⁶

In addition, the court in *Upton* held that “neither the projected disposable income test, nor [the] good faith requirement, either independently or in combination, permits debtors to accumulate savings

equation.’); *In re Okoreeh-Baah*, 836 F.2d 1030, 1033 (6th Cir. 1988) (“Good faith is an amorphous notion, largely defined by factual inquiry. In a good faith analysis, the infinite variety of factors facing any particular debtor must be weighed carefully. We cannot here promulgate any precise formulae or measurements to be deployed in a mechanical good faith equation. The bankruptcy court must ultimately determine whether the debtor’s plan, given his or her individual circumstances, satisfies the purposes undergirding Chapter 13 [The decision should be] left simply to the bankruptcy court’s common sense and judgment.”)).

269. *Mains v. Foley*, 2012 WL 612006 at *4.

270. *Id.*

271. *Id.* (citing *In re Upton*, 363 B.R. 528 (Bankr. S.D. Ohio 2007)).

272. *In re Upton*, 363 B.R. 528 (Bankr. S.D. Ohio 2007).

273. *Id.* at 535.

274. *Mains v. Foley*, 2012 WL 612006 at *4 (citing *In re Upton*, 363 B.R. at 536).

275. *Id.*

276. *In re Upton*, 363 B.R. at 536 (citing *In re Edmunds*, 350 B.R. 636, 649 (Bankr. D. S.C. 2006) (citing H.R. REP. NO. 109-31(1), at 5 (2005), U.S. CODE CONG. & ADMIN. NEWS 2005, at 88, 91-92)).

while paying unsecured creditors less than 100%.”²⁷⁷ This observation by the court comports with the notion that the good faith requirement and projected disposable income tests are separate and distinct inquiries that were intended by Congress to prevent debtors from evading their obligations to pay their debts when they had the ability to do so.²⁷⁸

The exclusion of benefits approach, however, argues that it would “render § 1325(b)’s ability to pay test meaningless” if the debtor’s exclusion of Social Security benefits from his/her plan was a part of the good faith analysis.²⁷⁹ The opposing approach is misguided, however, due to a “misunderstanding of the interplay between the good faith test of section 1325(a), and the objective ‘disposable income’ test of section 1325(b).”²⁸⁰ If courts were to treat the *Thompson*²⁸¹ holding as the prevailing rule, it “would prevent §1325(a) from functioning as a check on debtors who could satisfy the means test despite a subjective finding of bad faith, and would effectively read language Congress chose to include only in section 1325(b) back into section 1325(a).”²⁸²

Furthermore, the exclusion approach argues that considering whether a debtor contributes his/her Social Security benefits to his/her plan payments under the good faith test would be duplicative since this was already considered under § 1325(b)’s ability to pay test.²⁸³ Again, the opposing side is misguided because while it is true that courts would be considering this issue twice, Congress specifically chose two separate tests that courts must apply when ruling on an above-median-debtor’s proposed plan.²⁸⁴ In addition, courts have held that simply because an individual meets the requirements under § 1325(b) does not mean that he/she has met the burden of demonstrating good faith in the proposal of their plan.²⁸⁵ The court must still determine good faith based upon

277. *Id.*

278. *Mains v. Foley*, 2012 WL 612006 at *4; *In re Edmunds*, 350 B.R. 636, 649 (Bankr. D. S.C. 2006) (“Congress . . . indicated a clear intent to curb opportunistic filings and its displeasure with the practice of allowing debtors, who are able to repay their debts, to avoid their obligations to creditors.” See H.R. REP. NO. 109-31(1), at 5 (2005).”).

279. *In re Thompson*, 439 B.R. 140, 143 (8th Cir. 2010) (citing *In re Barfknecht*, 378 B.R. 154, 164 (Bankr. W.D. Tex. 2007)).

280. *Mains v. Foley*, 2012 WL 612006 at *5.

281. *In re Thompson*, 439 B.R. 140 (8th Cir. 2010).

282. *Mains v. Foley*, 2012 WL 612006 at *5.

283. *In re Thompson*, 439 B.R. at 143.

284. *Mains v. Foley*, 2012 WL 612006 at *4. See also 11 U.S.C.S. § 1325(a) (good faith test); 11 U.S.C.S. § 1325(b) (ability to pay test).

285. *In re Edmunds*, 350 B.R. 636, 648 (Bankr. D. S.C. 2006) (“See *Solomon*, 67 F.3d at 1134 (remanding a case to the bankruptcy court to consider whether debtor’s plan was proposed in good faith); *In re Sellers*, 285 B.R. 769, 773, n.4 (Bankr. S.D. Ga. 2001) (finding that a debtor who meets

varying factors under the totality of circumstances.²⁸⁶ These factors are relevant even if the debtor's plan has satisfied the § 1325(b) requirement.²⁸⁷

By looking at the BAPCPA, it is clear that Congress meant for § 1325(a) to be separate and distinct from § 1325(b).²⁸⁸ In addressing this issue, courts have looked to two canons of statutory construction to determine that the good faith requirement is “alive and well as a separate and independent requirement for confirmation, notwithstanding compliance with the disposable income test.”²⁸⁹

First, when Congress adopted BAPCPA in 2005, “it is presumed to have had knowledge of the existing requirements for confirmation, including the interpretations given by the bankruptcy courts to the good faith requirement.”²⁹⁰ Second, “interpretation[s] of statutes that render language superfluous are disfavored.”²⁹¹ If as a result of Congress'[s] adoption of BAPCPA, the good faith test was wholly subsumed by the disposable income and other tests under § 1325(b), § 1325(a)(3) would be superfluous and would have been eliminated by Congress.²⁹² It was not.²⁹³ Therefore, based upon two separate canons on statutory construction, it suggests that the good faith test is not limited by the objective disposable income test.²⁹⁴

the “disposable income” test does not nullify any further consideration of substantiality of repayment as a part of the totality of circumstances analysis. After a debtor meets the good faith test under this standard, Congress then required a minimum payment as measured by the debtor's disposable income. If debtor's payments fall below this floor, the plan cannot be confirmed even if debtor's good faith and honesty are unquestioned.”); *In re Reyes*, 106 B.R. 155, 156 (Bankr. N.D. Ill. 1989) (holding that § 1325(b) merely prohibits the Court from raising a debtor's disposable income *sua sponte* and finding that debtor must meet the requirements of § 1325(a) and, if the trustee objects, the requirement of § 1325(b))”.

286. *Id.*

287. *Id.* (See Solomon, 67 F.3d at 1134 (remanding a case to the bankruptcy court to consider each of the *Deans* factors notwithstanding the fact that the debtor appeared to meet the requirements of § 1325(b)), *In re McLaughlin*, 217 B.R. 772, 782 (Bankr. N.D. Tex. 1998) (finding § 1325(b) is not a substitute or alternative for § 1325(a)); *Sellers*, 285 B.R. at 773 (finding that the better view is that the inquiry under § 1325(b) does not preclude the court from considering substantiality of repayment)”.

288. *In re Sandburg*, 433 B.R. 837, 847 (Bankr. D. Kansas 2010).

289. *Id.* at 847-48.

290. *Id.* at 848 (citing *Northwest Bank Worthington v. Ahlers*, 485 U.S. 197, 211 (1988)).

291. *Id.* (citing *In re Stephens*, 402 B.R. 1, 6 (10th Cir. BAP 2009); *In re Lanning*, 545 F.3d 1269, 1279 (10th Cir. 2008), *aff'd* *Hamilton v. Lanning*, — U.S. —, 560 U.S. 505 (2010); *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998) (Courts are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.)).

292. *Id.*

293. *Id.*

294. *Id.*

2. Upon Parsing Through the Bankruptcy Code Itself, Courts Should Next Evaluate the Provisions of the Social Security Act Affecting the Assignment of Benefits²⁹⁵

Under 42 U.S.C. § 407:

(a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

(b) No other provision of law . . . may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.²⁹⁶

The exclusion of Social Security benefits approach argues this provision of the Social Security Act prevents courts from considering Social Security benefits in evaluating good faith under § 1325(a)²⁹⁷ because it “effectively subjects them to the operation of any bankruptcy or insolvency law, contrary to the Act.”²⁹⁸

The exclusion of Social Security benefits approach, however, fails to consider the true focus of § 407, which “is on a third party’s compelled acquisition through legal process of someone else’s Social Security benefits.”²⁹⁹ Under the good faith analysis of § 1325, this is not what courts are considering.³⁰⁰ Instead, the good faith test simply requires a debtor to demonstrate good faith in their Chapter 13 plan proposal.³⁰¹ As one court stated:

It is a transactional test no different in principle than a Social Security beneficiary’s decision to use his or her benefits to purchase anything of value that the beneficiary desires. No one would suggest that such a beneficiary has immunity from paying the restaurant bill he or she incurred just because the cash to pay came from Social Security benefits. By the same token, nothing in section 407 of the Social

295. *Mains v. Foley*, 2012 WL 612006 at *4. (“Answering the question requires not only a parsing of the Bankruptcy Code provisions, but also evaluation of a provision of the Social Security Act affecting assignment of benefits.”).

296. 42 U.S.C. § 407.

297. *Mains v. Foley*, 2012 WL 612006 at *4.

298. *Id.* at *5.

299. *Id.*

300. *Id.*

301. *Id.*; 11 U.S.C. § 1325(a).

Security Act gives a debtor immunity from demonstrating good faith as a pre-condition to confirmation of a Chapter 13 plan, even if a particular case. . .demonstrating good faith requires including some or all of the Social Security benefits in the plan.³⁰²

Therefore, the Bankruptcy Code itself supports the notion that an above-median-debtors decision to exclude Social Security benefits should be considered in the good faith analysis.³⁰³

3. An Above-Median-Debtors Decision to Not Commit Available Social Security Benefits to Unsecured Creditors in the Good Faith Analysis Under 11 U.S.C. § 1325(a)(3) is Not Per Se Bad Faith; Rather It Is Just One Factor Courts Can Consider Under the Totality of Circumstances Test

The exclusion of Social Security benefits approach asserts that proponents of including a debtor's Social Security benefits within the good faith analysis are creating a *per se* rule that an individual who does not commit available Social Security benefits to their plan has done so in bad faith and therefore, should be denied.³⁰⁴ Again, this is a misinterpretation.³⁰⁵ The approach taken by proponents of including Social Security benefits within the good faith analysis is not that an individual's plan should automatically be denied if they have not committed available Social Security benefits to their plan; rather it is that choosing to do so should be considered as one of the factors under the totality of circumstances test.³⁰⁶

It is the intrinsic flexibility of the good faith standard that is its strength, "both in general, and in the particular assessment of whether, when and how Social Security benefits must fit into the good faith determination."³⁰⁷ A *per se* rule in either direction would in fact defeat the purpose of the good faith test.³⁰⁸

Proponents for inclusion, however, argue "[t]hat a debtor's failure to commit [Social Security benefits] for purposes of repaying the maximum amount to creditors may be considered as one of many factors

302. Mains v. Foley, 2012 WL 612006 at *5.

303. *Id.*

304. *In re Barfknecht*, 378 B.R. 154, 164 (Bankr. W.D. Tex. 2007) ("Accepting the trustee's reading of good faith in these two matters would amount to adopting a *per se* rule.").

305. Mains v. Foley, 2012 WL 612006 at *6.

306. *Id.* ("Indeed, no one reasonably could advocate for a *per se* rule on the issue, given the open-ended statutory language and judicial gloss on the good faith standard.").

307. *Id.*

308. *Id.*

under a totality of circumstances inquiry to determine good faith.”³⁰⁹ The reason for establishing this only as a factor for courts to consider and not as a *per se* rule is because proponents for including Social Security benefits acknowledge that Social Security benefits are “vital to many Americans because it provides predictable and certain benefits.”³¹⁰ “Nonetheless, [Social Security benefits are] income and [the] debtor should not be allowed to shield . . . that income” from creditors.³¹¹

VII.CONCLUSION

Courts should consider a debtor’s decision to exclude Social Security benefits to unsecured debtors when determining if the plan was proposed in good faith. This should be included simply as a factor, not as a *per se* rule that automatically makes a plan proposition in bad faith. The fact Congress, armed with the knowledge of case law and the split among courts, chose not to exclude Social Security benefits from the good faith analysis after having specifically excluding Social Security benefits from the disposable income analysis under § 1325(b) shows a clear intent by Congress to allow courts to consider Social Security benefits under the good faith test of § 1325(a). The strength of this good faith standard is based in its intrinsic flexibility. Therefore, this Comment is not advocating for a *per se* rule, but suggesting courts at a minimum consider an individual’s exclusion of Social Security benefits under the good faith analysis. With the amount of bankruptcy cases filed each year, the issue of whether a debtor’s exclusion of Social Security benefits from his/her proposed plan to unsecured creditors should be included in the good faith analysis should be answered by courts with a resounding “Yes!” To abide by the heart of bankruptcy law, courts should begin to adopt this approach.

This approach is deeply rooted and backed by a clear reading and interpretation of the Bankruptcy Code and the Social Security Act. Those opposed to this approach fail to understand the interplay between the good faith test of § 1325(a) and the disposable income test of § 1325(b). Therefore, simply looking at Congress’s act of leaving the

309. *In re Bartelini*, 434 B.R. 285, 297 (Bankr. N.D. N.Y. 2010); *see also In re Welsh*, 440 B.R. 836, 847 (Bankr. D. Mont. 2010) (“The Court reviews the totality of the circumstances to determine whether a plan has been proposed in good faith. *In re Leavitt*, 171 F.3d 1219, 1224-25 (9th Cir. 1999); *Eisen v. Curry (In re Eisen)*, 14 F.3d 469, 470 (9th Cir. 1994); *In re Gress*, 257 B.R. 563, 567, 18 Mont. B.R. 30, 34 (Bankr. D. Mont. 2000)”).

310. *In re Thomas*, 443 B.R. 213, 219 (Bankr. N.D. Ga. 2010) (citing *In re Devilliers*, 358 B.R. 849, 865-66 (citation omitted)).

311. *Id.*

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good faith test under § 1325(a) unchanged when it enacted BAPCPA, shows Congress intended to allow courts to be flexible in considering a debtor's decision not to include his/her Social Security benefits in his/her plan as a factor for good faith.

The beauty of Congress's decision and the factor approach is that it allows individuals who do exclude their Social Security benefits as a part of their plan to still meet the good faith requirement of §1325(a), when the debtor's particular circumstances justify this conclusion, because it is only one factor out of a variety that courts may consider. Therefore, when an individual can show a justified reason for failing to include Social Security benefits, the court may weigh this factor against the fact that the debtor excluded such benefits. In such a circumstance, the debtor may be neither a pig nor a hog. Instead, a court may conclude that the debtor is not "getting fat" and also should "not be slaughtered." But in other circumstances, the court may find exactly the opposite. In weighing these two factors – the debtor's choice to exclude Social Security benefits from the plan and the debtor's proposed justification for withholding that income from the plan – with other varying factors, the court can make a justified decision and still uphold the very foundation and policy rationale behind the bankruptcy system.